### EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

1177

No. 3192

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, and the Substituted Defendants Therein, to-wit: ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, S. J. BELL, M. O'CONNELL and HARRY W. DAVIS as Trustees, Acting for and on Behalf of Said THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Defunct Corporation,

Plaintiffs in Error,

vs.

MARY ELLEN KIBBE,

Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.**



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the Superior Court of the State of California in and for the City and County of San Francisco.*

No. 68,416, Dept. ——.

MARY ELLEN KIBBE,

Plaintiff,

vs.

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,

Defendant.

**Complaint for Damages.**

The plaintiff above named complains of the defendant above named and for cause of action alleges:

I.

That United Properties Company of California is now and during all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Delaware and having its principal place of business in the City and County of San Francisco, State of California.

II.

That on the 15th day of February, 1912, the defendant for a valuable consideration undertook and agreed in writing to deliver to Ira M. Condit and Mary Ellen Kibby as joint owners or the survivor of them or order thirteen of its first mortgage and collateral trust five per cent fifty year sinking fund gold bonds of the denomination of $1,000 each with all interest coupons attached, said bonds to be issued under and secured by a deed of trust dated January 1st, 1911, then in course of preparation made by the said defendant and so to be delivered under, as and

when said bonds might be certified, issued and ready for delivery; a true and correct copy of which agreement, marked exhibit "A" is hereto attached and is hereby referred to and made a part hereof for all purposes in the same manner as if the same were specifically and in this paragraph at length set forth. [1*]

III.

That the said Ira M. Condit died on the 25th day of April, 1915, and that the plaintiff Mary Ellen Kibbe is the sole owner and holder of the said agreement; that the said Mary Ellen Kibbe mentioned in the said agreement is the same person as the plaintiff herein; that the true and correct name of said Mary Ellen Kibby as mentioned in the said agreement is "Mary Ellen Kibbe," and that said Mary Ellen Kibbe was the daughter of said Ira M. Condit.

IV.

That on the 13th day of September, 1915, the said plaintiff demanded that the said defendant execute and deliver to the plaintiff its said thirteen first mortgage and collateral gold bonds as required by the said agreement and execute the said deed of trust mentioned in the said agreement, and that the said defendant has wholly failed, refused and neglected to execute and deliver said bonds or to execute the said deed of trust and the said bonds have never been executed or delivered to plaintiff or at all and the said deed of trust has never been executed.

V.

That at the time said demand was made by said

*Page-number appearing at foot of page of original certified Transcript of Record.

plaintiff the said plaintiff tendered to the said defendant the said agreement, a copy of which is set forth in said exhibit "A" as aforesaid and offered to surrender to said defendant the said agreement upon the execution and delivery by said defendant to said plaintiff of the said thirteen bonds.

VI.

That no part of the said sum of $13,000 mentioned in the said agreement has been paid to the plaintiff or at all; that had said gold bond been executed and delivered to plaintiff as [2] required by said agreement and had the said deed of trust been executed as required by said last mentioned agreement the said bonds would now be of the value of $13,000 in gold coin of the United States and that by reason of the premises plaintiff has been and is damaged in the sum of $13,000.

WHEREFORE, plaintiff prays for judgment against said defendant in the sum of $13,000, interest at the rate of six per cent per annum and costs of this action.

HERBERT W. ERSKINE,
Attorney for Plaintiff.

State of California,
County of Alameda,—ss.

Mary Ellen Kibbe, being duly sworn deposes and says: that she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof, that the same is true of her own knowledge except those matters which are therein stated on information and belief and as

to those matters she believes it to be true.

MARY ELLEN KIBBE.

Subscribed and sworn to before me this 16th day of September, 1915.

HARRIS JENKS,

Notary Public in and for the County of Alameda, State of California. [3]

(Filed Sept. 17, 1915. H. I. Mulcrevy, Clerk. By W. R. Castagneto, Deputy Clerk.)

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**Exhibit "A" to Bill of Complaint.**

"BOND CERTIFICATE.

| Number | Par Value of Bonds |
|---|---|
| 660. | $13,000.00 |
| For First Mortgage and Collateral Trust Five Per Cent | Fifty-Year Sinking Fund Gold Bonds. |

THE UNITED PROPERTIES COMPANY OF CALIFORNIA.

The United Properties Company of California, a corporation organized and existing under the laws of the State of Delaware, for value received, promises to deliver to Ira M. Condit and Mary Ellen Kibby as Joint Owners, or the Survivor of them, or order, upon the surrender of this Certificate duly endorsed, thirteen of its "First Mortgage and Collateral, Trust Five Per Cent Fifty Year Sinking Fund Gold Bonds," of the denomination of One Thousand Dollars ($1,000.00) each with all interest coupons thereto attached, said bonds to be issued under and secured by the Deed of Trust in prepara-

tion dated January 1, 1911, made by said The United Properties Company of California, and to be delivered hereunder as and when the said bonds may be certified and ready for delivery.

IN WITNESS WHEREOF, said The United Properties Company of California, has hereunto caused its corporate name to be signed and its corporate seal to be affixed by its President or one of the Vice-Presidents and Treasurer or Assistant Treasurer thereunto duly authorized, this 15th day of February, 1912.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA.

W. K. ALBERGER,
Vice-President.

A. G. RAYERAFT,
Asst. Treasurer. [4]

Endorsed on Certificate:

"Interest from Jan. 1st to July 1st, 1911, amounting to $325.00 paid July 1st, 1911, $25.00 Nov. 18, 1911, $300.00.

A. G. RAYERAFT,
Asst. Treasurer.

"Interest from July 1st, 1911 to Jan. 1st, 1912, amounting to $325.00, paid Jan. 2nd, 1912.

A. G. RAYERAFT,
Asst. Treasurer.

"Interest from Jan. 1st, 1912 to July 1st, 1912 amounting to $325.00 paid July 1st, 1912.

A. G. RAYERAFT,
Asst. Treasurer.

"Interest from July 1st, 1912 to Jan. 1st, 1913 amounting to $325.00 paid January 2nd, 1912.

A. G. RAYERAFT,
Asst. Treasurer."

"For Value Received —— hereby sell, assign and transfer unto ———— the within Bond Certificate for ——— bonds of the within named Company, represented by the said Bond Certificate, and to hereby irrevocably constitute and appoint ———— attorney to transfer the said Bond Certificate, or to exchange the same for the bonds represented thereby, with the full power of substitution in the premises.

Dated ——, 19—.

————————.

In the presence of

————————. [5]

———

*In the Superior Court of the State of California, in and for the City and County of San Francisco.*

No. 68,416, Dept. No. ——.

MARY ELLEN KIBBE,

Plaintiff,

vs.

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,

Defendant.

**(Notice of Petition for Removal.)**

To Plaintiff Above Named, and to Her Attorney, Herbert W. Erskine, Esq.:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on February 15th, 1916, at four o'clock P. M. of said day, or as soon thereafter as may be, the defendant will file in the above-entitled Court a verified petition for the removal of this suit to the District Court of the United States, for the Northern District of California, together with a bond in the sum to be fixed by the Court, with good and sufficient sureties, for the defendant entering in such District Court within thirty days from date of the filing of said petition, a certified copy of the record of said suit, and for paying all costs that may be awarded by the said District Court, if said District Court should hold that such suit was wrongfully or improperly removed thereto, and also for the defendants appearing and entering special bail in such suit if special bail was originally requisite therein.

Said petition will be made upon the ground that the controversy in said suit is, and at the time of the commencement of this suit, and at the time when the demands mentioned in the complaint were assigned to and acquired by the plaintiff, a controversy wholly between citizens and residents of [6] different states.

Dated: February 15, 1916.

R. P. HENSHALL,
Attorney for Defendant.

Upon application of the defendant, and good cause appearing therefor.

IT IS ORDERED that the foregoing notice may be served at any time earlier than three hours before the filing of said petition and bond in the above-entitled court.

Dated: February 15, 1916.

GEORGE H. CABANISS,
Judge of the Superior Court.

Due service and receipt of the foregoing notice is hereby admitted this 15th day of Feb. 1916 at the hour of 12:38 P. M.

HERBERT W. ERSKINE,
(By A. D. K.)
Attorney for Plaintiff. [7]

(Filed Feb. 15, 1916, H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk.)

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*In the Superior Court of the State of California, in and for the City and County of San Francisco, Department No. ——.*

No. 68,416.

MARY ELLEN KIBBE,
Plaintiff,

vs.

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,
Defendant.

**Petition for Removal to the District Court of the United States for the Northern District of California.**

To the Honorable the Superior Court of the State of California, in and for the city and county of San Francisco:

Your petitioner, United Properties Company of California, a corporation, respectfully shows:

That this is a suit of a civil nature at law, wherein the plaintiff seeks to recover of this petitioner the sum of $13,000 damages, exclusive of interest and costs; that the amount in dispute in the above-entitled action exceeds the sum or value of $3,000, exclusive of interest and costs; that the controversy in said suit is and at the time of the commencement of this suit and at the time of the death of Ira M. Condit, mentioned in the complaint therein, was wholly between citizens and residents of different States, which suit can be fully determined between them; that your petitioner, United Properties Company of California, a corporation, was at the time of the death of the said Ira M. Condit, mentioned in the complaint in said suit, and was at the time of the commencement of this suit, and still is, a resident and citizen of the State of Delaware, to wit, a corporation organized and existing under the laws of the State of Delaware, and that said corporation is a non-resident of the State of California; that the plaintiff, Mary Ellen Kibbe, also referred to in the complaint as [8] Mary Ellen Kibby, was at the time of the commencement of this suit and still is a resident and citizen of the city of Oakland, county

of Alameda, State of California, and that said Ira M. Condit, referred to in the complaint in said action, was at the time of his death a resident and citizen of the city of Oakland, county of Alameda, and State of California; that neither said Mary Ellen Kibbe nor said Ira M. Condit was, or is, a resident or citizen of the State of Delaware;

That your petitioner has filed herein and offers herewith a bond, with good and sufficient surety, for its entering in the District Court of the United States, in and for the Northern District of California, within thirty days from the date of the filing of this petition, a certified copy of the record in this suit and for paying all costs that may be awarded by the said District Court, if said District Court shall hold that this suit was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said suit, if such special bail was originally requisite therein.

Your petitioner therefore prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept said bond and to cause the record herein to be removed to the District Court of the United States in and for the Northern District of California; and it will ever pray.

[Seal] UNITED PROPERTIES COMPANY OF CALIFORNIA (a Corporation),
By ALBERT HANFORD,
President.

R. P. HENSHALL,
Attorney for Petitioner, 1208 Merchants National Bank Building, San Francisco, California. [9]

State of California,
City and County of San Francisco,—ss.

Albert Hanford, being first duly sworn, deposes and says:

I am an officer, to wit, the president of the United Properties Company of California, a corporation, the above-named petitioner, and that I am authorized to make this verification, and do so on behalf of said corporation; that as such officer I have read the above and foregoing petition and know the contents thereof, and the same is true of my own knowledge, except as to the matters that are therein stated on information or belief, and as to those matters I believe it to be true.

ALBERT HANFORD,

Subscribed and sworn to before me this 15th day of February, 1916.

[Seal] CHARLES P. HOLTEN,
Notary Public in and for the City and County of San Francisco, State of California. [10]

(Filed Feb. 15, 1916. H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk.)

*In the Superior Court of the State of California, in and for the City and County of San Francisco, Department No. ——.*

No. 68,416.

MARY ELLEN KIBBE,

Plaintiff,

vs.

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,

Defendant.

**Bond on Removal.**

KNOW ALL MEN BY THESE PRESENTS: That United Properties Company of California, a corporation, as principal, and Illinois Surety Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, as surety, are held and firmly bound unto Mary Ellen Kibbe in the sum of One Thousand Dollars ($1,000), for the payment of which, well and truly to be made unto the said Mary Ellen Kibbe, the said United Properties Company of California, and the said Illinois Surety Company bind themselves, their successors and assigns, jointly and firmly by these presents, upon the condition, nevertheless, that

WHEREAS, the said Mary Ellen Kibbe has commenced a suit of civil nature in the Superior Court of the State of California, in and for the city and county of San Francisco, against the said United Properties Company of California; and

WHEREAS, the said United Properties Company of California, simultaneously with the filing of this bond, intends to file its petition in said court for the removal of said suit unto the District Court of the United States in and for the Northern District of California, according to the provisions of the Acts of Congress in such case made and provided:
[11]

NOW, THEREFORE, the condition of this obligation is such that if said petitioner, United Properties Company of California, a corporation, shall enter in said District Court of the United States in and for the Northern District of California, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded by the said District Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit, if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

IN WITNESS WHEREOF, the said United Properties Company of California has caused these presents to —— executed and its corporate name and seal to be hereunto affixed by its president, and the said Illinois Surety Company has caused its corporate name and seal to be hereunto affixed by Harold M. Parsons, its attorney in fact, all on this

15th day of February, 1916.

UNITED PROPERTIES COMPANY OF CALIFORNIA.
By ALBERT HANFORD,
ILLINOIS SURETY COMPANY,
By HAROLD M. PARSONS,
Its Attorney in Fact.

The foregoing undertaking is hereby approved by me this 15th day of February, 1916.

GEO. A. STURTEVANT,
Judge of the Superior Court. [12]

(Filed Feb. 15, 1916. H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk.)

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*In the Superior Court of the State of California, in and for the City and County of San Francisco.*

No. 68,416—Dept. No. ——.

MARY ELLEN KIBBE,
Plaintiff,

vs.

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,
Defendant.

**Order of Removal.**

The defendant, United Properties Company of California, a corporation, having filed in this Court its petition and bond, as required by law, for the removal of this suit to the District Court of the United States, in and for the Northern District of Cali-

fornia; and, it appearing to the Court that written notice of said petition and bond for removal was given to the plaintiff and brought to her attention prior to filing the same herein; and, it appearing to the Court that said petition is sufficient in law to warrant said removal; and the said bond appearing sufficient, and the Court being fully advised.

IT IS ORDERED that the said bond be, and the same is hereby approved and accepted, and that the above-entitled cause be removed to the District Court of the United States, in and for the Northern District of California.

Done in open court this 15th day of February, 1916.

GEO. A. STURTEVANT,

Judge of the Superior Court of the State of California, in and for the City and County of San Francisco. [13]

State of California,
City and County of San Francisco,—ss.

I, H. I. Mulcrevy, County Clerk, of the City and County of San Francisco, State of California, and *ex-officio* Clerk of the Superior Court, in and for said city and county.

HEREBY CERTIFY the foregoing to be a full, true and correct Copy of the original complaint; notice of petition for removal; petition for removal; order of removal and bond on removal constituting all documents in action of Edmund J. Burkhardt vs. United Properties Company of California, a corporation, #70,212, on file in my office on the 2d day of March, A. D. 1916.

ATTEST my hand and seal of said court, this 2d day of March, A. D. 1916.

[Seal] H. I. MULCREVY,
Clerk.
By H. Brunner,
Deputy Clerk.

(Documentary stamp canceled.) [14]

(Filed Feb. 15, 1916. H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk.)

**Notice of Service of Filing of Record.**

In this cause the defendant, United Properties Company of California, a corporation, having been regularly served with a notice of filing of record on removal from Superior Court, city and county of San Francisco, as appears from the record and papers on file herein, and having failed to appear and plead, answer or demur to plaintiff's complaint, within the time allowed by law, and the time for appearing and pleading, answering and demurring having expired;

Now, upon application of Herbert W. Erskine, attorney for plaintiff; the default of the defendant United Properties Company of California, a corporation, is hereby entered herein, according to law.

In testimony whereof, I have hereunto set my hand and seal of the District Court of the United States for the Northern District of California, this 4th day of April, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 15,967½. In the District Court of the United States in and for the Northern District of California. Mary Ellen Kibbe, Plaintiff, vs. United Properties Company of California, a corporation, Defendant. Record of Documents Filed in the Superior Court (San Francisco). No. 68,416. Filed Mar. 2, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

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*In the District Court of the United States in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,

Defendant.

**(Stipulation Setting Aside Default; Waiving Jury and Setting for Trial.)**

It is hereby stipulated by and between the undersigned that the default of the defendant entered in the above-entitled action may be set aside, that the trial of the said action may be set for the earliest possible time before the Court without a jury, and that a trial by jury be and the same is hereby waived, that this action may be tried at the same time and in conjunction with the action of Burkhardt vs. United Properties Company, No. 15,968, and the ac-

tion of Burkhardt vs. United Properties Company No. 15,979.

Dated April 26th, 1916.

HERBERT W. ERSKINE,
Attorney for Plaintiff.

R. P. HENSHALL,
Attorney for Defendant.

[Endorsed]: Filed Apr. 26, 1916. Walter B. Maling, Clerk. [16]

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,

Defendant.

**Answer.**

Now comes the defendant in the above-entitled action and for its answer to complaint of plaintiff, on file herein, shows as follows:

I.

It denies that on the 15th day of February, 1912, or at any time, the defendant, for a valuable consideration, or for any consideration, then undertook and agreed, or undertook or agreed, in writing or otherwise, to deliver to Ira M. Condit and Mary

Ellen Kibbe, or to their order, thirteen First Mortgage and Collateral Trust Five Per Cent Fifty Year Sinking Fund Gold Bonds of the denomination of $1,000 each, or of any denomination, with all or with any interest coupons attached, said bonds to be issued under and secured by, or to be issued under or secured by a deed of trust, dated January 1, 1911, or dated at any time, then, or at any time in course of preparation made by the said defendant, United Properties Company of California, and so to be [17] delivered, or so to be delivered, under, as and when, or under, as or when, the said bonds, or any bonds or bond might be certified, issued and ready, or certified, issued or ready for delivery, and denies that the said alleged agreement, marked Exhibit "A" to the complaint, is a true and correct copy of said alleged agreement, or that there was any such agreement whatsoever made with the United Properties Company of California; and in this regard the defendant alleges that the facts with respect to the issuance of said certificate, so claimed to be owned by the plaintiff herein, are more particularly set forth in the first affirmative defense to the plaintiff's first cause of action, hereinafter stated and alleged, and not otherwise.

II.

Denies that had the Gold Bonds been delivered to said Ira M. Condit and Mary Ellen Kibbe, as alleged in said complaint, the said bonds would be worth the sum of $13,000, or any other sum, in Gold Coin of the United States.

III.

Alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegation contained in Paragraph III of said complaint, and basing its answer upon that ground, it denies that the said Ira M. Condit died on the 25th day of April, 1915, and on like ground denies that the plaintiff, Mary Ellen Kibbe is the sole owner and holder of the said agreement, referred to in said complaint; and on like ground denies that the said Mary Ellen Kibby mentioned in the said agreement is [18] the same person as the plaintiff herein; and on like ground denies that the true and correct name of said Mary Ellen Kibby, as mentioned in the said agreement, is "Mary Ellen Kibbe," or that the said Mary Ellen Kibbe is the daughter of the said Ira M. Condit.

IV.

Denies that by reason of the premises the plaintiff has been damaged in the sum of $13,000, or in any other sum whatever. [19]

FIRST AFFIRMATIVE DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION.

And as and for a further and separate answer and defense to the alleged first count or cause of action, set forth in said complaint, this defendant alleges:

I.

That on or about February 16, 1911, certain of the officers of the said The United Properties Company of California issued to R. G. Hanford an instrument similar in form and tenor to the instrument set out by plaintiff in her first cause of action, but bearing

the number "47"; that said instrument was thereafter, to wit, on or about June 27, 1911, surrendered by the said R. G. Hanford and a new instrument, similar in form and tenor, numbered "498," issued by the said officers to the Hanford Investment Company, in lieu of part thereof; that the said instrument No. "498" was thereafter, to wit, on or about November 18, 1911, surrendered by the said Hanford Investment Company and a new instrument, similar in form and tenor, numbered "549," issued by the said officers to William Hammond, Jr., in lieu of part thereof; that the said instrument, No. "549," was thereafter, to wit, on or about November 21, 1911, surrendered by the said William Hammond, Jr., and a new instrument, similar in form and tenor, numbered "553," issued by the said officers to George R. Dickey, in lieu of part thereof; that the said instrument No. "553" was thereafter, to wit, on or about January 5, 1912, surrendered by the said Geo. R. Dickey, and a new instrument, similar in form and tenor, numbered [20] "616," issued by the said officers to R. B. Mott, in lieu of part thereof.

That on or about February 16, 1911, certain of the officers of the said The United Properties Company of California issued to R. G. Hanford an instrument similar in form and tenor to the instrument set out by plaintiff in her first cause of action, but bearing the number "45"; that the said instrument was thereafter, to wit, on or about March 11, 1911, surrendered by the said R. G. Hanford and new instruments, similar in form and tenor, numbered "73,"

"74," "75," "78" and "79," respectively, issued by the said officers to R. G. Hanford in lieu of part thereof.

That on or about February 16, 1911, certain of the officers of the said The United Properties Company of California issued to R. G. Hanford an instrument similar in form and tenor to the instrument set out by plaintiff in her first cause of action, but bearing the number "48"; that the said instrument was thereafter, to wit, on or about March 11, 1911, surrendered by the said R. G. Hanford and new instruments, similar in form and tenor, numbered "86," "96," "98" and "99," respectively, issued by the said officers to R. G. Hanford in lieu of part thereof.

That on or about February 16, 1911, certain of the officers of the said The United Properties Company of California issued to R. G. Hanford an instrument similar in form and tenor to the instrument set out by plaintiff in her first cause of action, but bearing the number "47"; that the said instrument was thereafter, to wit, on or about June 27, 1911, surrendered by the said R. G. Hanford and a new instrument, similar in form and tenor, numbered "497" issued by the said officers to Hanford Investment Company, in lieu of part thereof. [21]

That the aforesaid instruments, numbered "73," "74," "75," "78," "79," "86," "96," "98," "99" and "497," respectively, were thereafter, to wit, on or about September 26, 1911, surrendered by the said R. G. Hanford and Hanford Investment Company, and a new instrument, similar in form and tenor,

numbered "528," issued by the said officers to R. G. Hanford, in lieu of part thereof; that the said instrument No. "528" was thereafter, to wit, on or about September 28, 1911, surrendered by the said R. G. Hanford and a new instrument, similar in form and tenor, numbered "529," issued by the said officers to R. B. Mott; that the said instrument No. "529" was thereafter, to wit, on or about November 28, 1912, surrendered by the said R. B. Mott and a new instrument, similar in form and tenor, numbered "562," issued by the said officers to R. B. Mott, in lieu of part thereof; that the said instruments, numbered "616" and "562," respectively, were thereafter, to wit, on or about February 15, 1912, surrendered by the said R. B. Mott, and a new instrument, numbered "660," a copy of which instrument is set out and sued upon by plaintiff herein in her first cause of action, was issued by the said officers to Ira M. Condit and Mary Ellen Kibby, referred to in plaintiff's complaint.

II.

That no resolution was ever passed or adopted by the Board of Directors of the said The United Properties Company of California, authorizing the execution or issuance of the said instrument No. 47, or of any of the instruments which, as alleged in paragraph I, were thereafter issued in lieu of part thereof [22] or the execution or issuance of the said instrument sued upon by the plaintiff.

III.

That no meeting of the stockholders of said The United Properties Company of California was ever

called or held at which any vote was ever taken authorizing the execution or issuance of the said instrument sued upon by the plaintiff or authorizing the execution or issuance of any of the said instruments preceding it, or authorizing the creation or the increase of any bonded indebtedness, or the execution or issuance of any bond or bond certificates, or the execution of the instrument sued upon by the plaintiff, or of any of the said instruments which preceded it, nor was the execution or issuance of the said instrument sued upon or any of the said instruments which preceded it, or the creation of any bonded indebtedness of the said The United Properties Company of California, or any of the acts above referred to ever approved by the written assent or assents of the stockholders of the said The United Properties Company of California holding two-thirds, or holding any proportion of the subscribed or issued capital stock thereof; nor was any attempt ever made by the directors or trustees or officers, or any of them, of said The United Properties Company of California, to comply with, or to conform to the provisions or requirements of Subdivisions 3, 4, or 5 of Section 359 of the Civil Code of the State of California, or the requirements or provisions of any of the laws of the State of California relative to the creation or increase of bonded indebtedness, or indebtedness of any kind, nor was the issuance of the said instrument sued upon, or any of the said instruments [23] which preceded it, ever ratified by the stockholders of the said The

United Properties Company of California, or by this defendant.

IV.

That the said R. G. Hanford at the time the said instrument bearing the number 47 was issued, as aforesaid, was a stockholder and member of the Board of Directors of the said The United Properties Company of California and the said R. G. Hanford had notice and knowledge of all of the facts connected with the issuance of the said instrument and knew that no attempt had been made to comply with the said provisions of Section 359 of the Civil Code of the State of California and that the said provisions of Section 359 of the Civil Code of the State of California had not been complied with in the respects hereinbefore specified, or in any respect, as required by any of the laws of the State of California.

SECOND AFFIRMATIVE DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION.

As a further, separate and affirmative defense to plaintiff's first cause of action, the said defendant alleges:

I.

That defendant hereby refers to and adopts the allegations of the preceding affirmative defense to plaintiff's first cause of action as fully as if the same was set out herein.

II.

That if the said defendant was held liable, or a judgment [24] entered against it, for the amount prayed for by the plaintiff, or for any amount, not-

withstanding the said facts set out in defendant's first affirmative defense hereto, the defendant would thereby be deprived of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

THIRD AFFIRMATIVE DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION.

As a further, separate and affirmative defense to plaintiff's first cause of action, the said defendant alleges:

I.

That the said alleged cause of action is barred by the provisions of Section 359 of the Code of Civil Procedure of the State of California.

FOURTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION.

As a further, separate and affirmative defense to plaintiff's first cause of action, the said defendant alleges:

I.

That said alleged cause of action is barred by the provisions of Section 338 of the Code of Civil Procedure of the State of California. [25]

FIFTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION.

As a further, separate and affirmative defense to plaintiff's first cause of action, the said defendant alleges:

I.

That said alleged cause of action is barred by the provisions of Section 339 of the Code of Civil Procedure of the State of California.

WHEREFORE, the said defendant prays that the plaintiff take nothing by her said action, but that it may be dismissed with its costs and disbursements herein expended.

R. P. HENSHALL,
Attorney for Defendant. [26]

State of California,
City and County of San Francisco,—ss.

Albert Hanford, being first duly sworn, deposes and says:

That he is an officer, to wit, the president of The United Properties Company of California, a corporation, the defendant in the above-entitled action, and makes this affidavit on its behalf; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his knowledge, except as to those matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

ALBERT HANFORD.

Subscribed and sworn to before me this 25th day of April, 1916.

[Seal] CHARLES R. HOLTON,
Notary Public in and for the City and County of San Francisco, State of California.

Service of the within answer is hereby admitted this 26th day of April, 1916.

HERBERT W. ERSKINE,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 26, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

*In the District Court of the United States in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,

Defendant.

**Admission of Certain Facts.**

Whereas the above-entitled action is at issue and ready for trial;

Now, therefore, the following facts and matters are admitted:

On the 31st day of December, 1910, the articles of incorporation of the defendant were filed in the office of the Secretary of State of the State of Delaware and a certificate of incorporation was thereupon issued.

The names of the incorporators are:

Christian B. Zabriskie,
Ralph Ewart,
Harry W. Davis.

Thereafter the first meeting of the corporation was held on the 31st day of December, 1910, at the office of the Delaware Trust Company, in the city of Wilmington, State of Delaware; [28]

C. B. Zabriskie owning 44 shares of the common capital stock of the defendant;

Ralph Ewart owning 3 shares of the common capital stock of the defendant, and

Harry W. Davis owning 3 shares of the common capital stock of the defendant.

The incorporators of the said defendant were present. The by-laws were duly and properly adopted at the said meeting. A copy of the provisions of these by-laws which deal with,

1. The election of directors,
2. The powers of the board of directors,
3. The creation and powers of an executive committee of the board of directors,
4. The powers of the president of the corporation and chairman of the executive committee during the intervals between the meetings of the latter,
5. The powers of the vice-president, secretary, assistant secretaries and treasurer,
6. The time, place and manner of the holding of stockholders' meetings, and
7. The filling of vacancies caused by the absence of directors,

are set forth in Exhibit "A," which is hereto annexed, hereby referred to and made a part hereof for all purposes.

Thereafter at the said meeting subscriptions for common capital stock of the said defendant were read. The names of the subscribers with the amounts subscribed by each, respectively set after their names, are as follows:

F. M. Smith, 10 shares,
W. S. Tevis, " "
R. G. Hanford, " "

Gavin McNab, " "
C. B. Zabriskie, 10 shares.
W. R. Alberger, " "
Dennis Searles, " " and
Harry W. Davis, " " [29]

Thereupon an election of directors was held and the following persons were elected directors of the corporation to serve until the annual meeting of stockholders on the 25th day of October, 1911. The said directors so elected were:

F. M. Smith,
W. S. Tevis,
R. G. Hanford,
Gavin McNab,
C. B. Zabriskie,
W. R. Alberger,
Dennis Searles, and
Harry W. Davis.

The Board of Directors was then duly and properly authorized to issue the capital stock of the defendant company in such amounts and proportions as from time to time they should determine, in full or partial payment for cash, property, contracts, rights, services and labor.

Thereafter the meeting adjounred.

By the articles of incorporation the corporation is given the power to purchase and acquire the capital stock of other corporations. This is designated in the articles as one of the purposes of incorporation.

The capital stock of the defendant consists of 2,000,000 shares of the par value of $100.00 a share,

divided into the following classes:

1. Preferred, 500,000 shares,
2. Convertible, 750,000 shares,
3. Common, 750,000 shares.

The articles provide that the holders of preferred and convertible stock shall not be entitled to a vote and shall not be entitled to participate in the affairs of the corporation; that the right to vote at any meeting of the stockholders shall be exercised solely and exclusively by the majority holders of the common stock. [30]

On January 13th, 1911, in San Francisco, California, the first meeting of directors was held. The following officers were elected:

F. M. Smith, President,
W. S. Tevis, First Vice-President,
W. R. Alberger, Second " "
C. B. Zabriskie, Treasurer,
Gavin McNab, Chief Counsel.

The following executive committee was appointed:

F. M. Smith,
Gavin McNab,
C. B. Zabriskie,

The meeting was then adjourned until February 24th, 1911.

On February 24th, 1911, the adjourned meeting was held. All of the directors were present with the exception of Harry W. Davis.

On February 16th, 1911, certificate No. 45, similar in form, tenor, covenants and provisions to said Exhibit "A" of complaint, but calling for five hundred bonds of the par value of Five Hundred Thousand

($500,000) Dollars, was subscribed by W. R. Alberger, vice-president and by C. B. Zabriskie, Treasurer, the seal of the corporation was affixed and the name of R. G. Hanford was written into said certificate in the place where the names of Ira M. Condit and Mary Ellen Kibby appear on said exhibit "A." This certificate was delivered to said R. G. Hanford subsequent to February 24th, 1911. [31]

On February 16th, 1911, certificate No. 47, similar in form, tenor, covenants and provisions to said exhibit "A," but calling for two hundred (200) bonds of the par value of Two Hundred Thousand ($200,000) Dollars, was subscribed by W. R. Alberger, vice-president, and by C. B. Zabriskie, treasurer, the seal of the corporation was affixed, the name of R. G. Hanford was written into said certificate in the place where the names of Ira M. Condit and Mary Ellen Kibby appear on the said exhibit "A." This certificate was delivered to said R. G. Hanford subsequent to February 24th, 1911.

On the 16th day of February 1911, certificate No. 48, similar in form, tenor, covenants and provisions to said exhibit "A," but calling for two hundred (200) bonds of the par value of two hundred thousand ($200,000) dollars, was subscribed by W. R. Alberger, vice-president, and by C. B. Zabriskie, treasurer, the seal of the corporation was affixed and the name of R. G. Hanford was written into said certificate in the place where the names of Ira M. Condit and Mary Ellen Kibby appear on the said exhibit "A." This certificate was delivered to

said R. G. Hanford subsequent to February 24th, 1911.

That on or about March 11th, 1911, certificate Number Forty-five (45) was surrendered by the said R. G. Hanford to the United Properties Company and in lieu of part thereof certificates numbered

[32] 73 for ten bonds,
74 " " "
75 " " "
78 " five " and
79 " " "

were signed by the officers of the corporation who signed certificate No. 45 or by officers duly appointed in the place thereof and the seal of the corporation was affixed to each of the said certificates numbered 73, 74, 75, 78 and 79; and each of them was issued to R. G. Hanford by the officers signing the same; each of said last-mentioned certificates was similar in form, tenor, provisions and covenants to Certificate No. 45.

That on or about June 27th, 1911, certificate No. 47 was surrendered by R. G. Hanford to the United Properties Company and in lieu thereof certificates numbered

497 for 100 bonds, and
498 " " "

were signed by the officers of the corporation, who signed certificate No. 47 or officers duly appointed in the place thereof and the seal of the corporation was affixed to each of the said certificates numbered 497 and 498 and each of them was issued by said officers to said Hanford Investment Company; each of

said last mentioned certificates was similar in form, tenor, provisions and covenants to Certificate No. 47.

That on or about March 11th, 1911, Certificate No. 48 was surrendered by the said R. G. Hanford to the United Properties Company and in lieu of part thereof certificates numbered

86 for 5 bonds,
96 " 10 "
98 " " " and
99 " "

were signed by the officers of the corporation who signed certificate No. 48 or by officers duly appointed in the place [33] thereof and the seal of the corporation was affixed to each of the said certificates numbered 86, 96, 98 and 99; and each of them was issued by said officers to said R. G. Hanford, each of said last mentioned certificates was similar in form, tenor, provisions and covenants to exhibit "A" and to Certificate No. 48.

That on or about September 26th, 1911, the aforesaid certificates numbered 73, 74, 75, 78, 79, 86, 96, 98, 99 and 497, respectively, were surrendered by R. G. Hanford and the Hanford Investment Company to the United Properties Company and in lieu of part of said last mentioned certificates a new certificate numbered 528 for 175 bonds, similar in form, tenor, provisions and covenants to said certificates numbered 45, 47 and 48, was signed by the officers of the United Properties Company signing certificates 45, 47 and 48, or by officers duly appointed in the place thereof, and with the seal of the corporation affixed, was issued by said officers to R. G. Hanford.

That thereafter on or about September 28th, 1911, said R. G. Hanford surrendered to the United Properties Company the said certificate No. 528 and in lieu of part thereof, at said R. G. Hanford's request, a new certificate No. 529 for thirty-seven bonds, similar in form, tenor, provisions and covenants to certificates numbered 45, 47 and 48, was signed by the said officers signing certificates numbered 45, 47 and 48, or by officers duly appointed in the place of the officers signing said last mentioned certificates, and with the seal of the corporation affixed thereto, the said certificate No. 529 was issued by the said officers to R. B. Mott.

That on or about the 28th day of November, 1911, the said R. B. Mott surrendered to the said United Properties Company the said certificate No. 529 and in lieu of part thereof a [34] certificate numbered 562 for one bond, similar in form, tenor, provisions and covenants to certificates numbered 45, 47 and 48, signed by the officers signing certificates numbered 45, 47 and 48 or officers duly appointed in the place thereof, was issued by said officers to said R. B. Mott.

That thereafter, on or about the 15th day of February, 1912, the said R. B. Mott transferred, assigned and set over to Ira M. Condit and Mary Ellen Kibbe as joint owners or to the survivor of them the said certificate No. 562.

That on or about the 28th day of November, 1911, the Hanford Investment Company surrendered to the United Properties Company certificate No. 498 and in lieu of part thereof, certificate No. 549 for twenty-five bonds, similar in form, tenor, provisions

and covenants to certificate No. 47 and signed by the officers signing certificate No. 47 or officers duly appointed in the place thereof and having the seal of the United Properties Company affixed thereto was issued by said officers to William Hammond, Jr.;

That thereafter on November 28th, 1911, the said William Hammond, Jr., surrendered to the United Properties Company certificate No. 549 and in lieu of part thereof, certificate No. 553 for twenty-five bonds, similar in form, tenor, provisions and covenants to certificate No. 549 and signed by the officers signing certificate No. 549 or officers duly appointed in the place thereof and having the seal of the United Properties Company affixed thereto was issued by said officers to Leo R. Dickie; that said Leo R. Dickie paid the said William Hammond, Jr., for said certificate No. 553 a good, sufficient and valuable consideration.

That thereafter on January 5th, 1912, the said Leo R. Dickie surrendered to the United Properties Company certificate [35] Number Five Hundred and Fifty-three (553) and in lieu of part thereof, certificate Number Six Hundred and Sixteen (616) for twelve (12) bonds, similar in form, tenor, provisions and covenants to Certificate Number Five Hundred and Fifty-three (553) and signed by the officers signing Certificate Number Five Hundred and Fifty-three (553) or officers duly appointed in the place thereof and having the seal of the United Properties Company affixed thereto was issued by said officers to R. B. Mott; that said R. B. Mott paid the said Leo R. Dickie for said Certificate Number

Six Hundred and Sixteen (616) a good, sufficient and valuable consideration.

That thereafter the said R. B. Mott transferred, assigned and set over to Ira M. Condit and Mary Ellen Kibbe as joint owners or to the survivor of them the said Certificate Number Six Hundred and Sixteen (616).

That on or about February 15th, 1912 said Condit and said Kibbe surrendered to the said United Properties Company Certificates Numbered Six Hundred and Sixteen and Five Hundred and Sixty-two (562) and in lieu thereof a new certificate numbered Six Hundred and Sixty (660), a copy of which is set out in full by the plaintiff in her complaint on file herein, was signed by the officers signing bond certificate Number Forty-seven (47) or officers duly appointed in the place thereof, the seal of the corporation was affixed and the said certificate was issued to said Ira M. Condit and Mary Ellen Kibbe as joint owners or to the survivors of them. [36]

Interest was paid on the indebtedness evidenced by that part of certificates numbered 45, 47 and 48 which became merged by virtue of the surrender and reissuance above referred to into certificate No. 660 for thirteen bonds of the par value of $1,000 each which certificate is the one sued on in the above-entitled action. This interest was paid in semi-annual installments at the rate of Five per cent per annum for the following periods:

from January 1st, 1911 to July 1st, 1911,
from July 1st, 1911 to January 1st, 1912,
from January 1st, 1912 to July 1st, 1912, and
from July 1st, 1912 to January 1st, 1913.

The said Kibbe and Condit received the installments of interest paid for the period from January 1st, 1912 to July 1st, 1912, from July 1st, 1912, to January 1st, 1913. Part of the first installment of interest was paid on July 1st, 1911, the balance thereof on November 18th, 1911, the second installment on the 2nd of January, 1912, the third installment on July 6th, 1912 and the fourth installment on January 9th, 1913.

During the time that each of the certificates hereinbefore referred to were issued there was kept in the office of the Company a certificate book containing documents numbered from 1 to 1500 inclusive, of the same form, tenor and containing the same provisions, terms and covenants contained in the certificate sued on, except that the name of the holder, the amount thereof and the date thereof were left blank and there were no signatures thereon and the seal of the corporation was not [37] affixed thereto. Attached to each of these certificates was a stub. When a certificate was issued, the name of the holder, the number of the certificate, the amount thereof and the date of issuance was written on the stub and then the certificate was detached from the stub and given to the holder after having been signed by the officers of the corporation and after having the seal affixed. When a certificate so issued was surrendered it was again affixed to its proper stub and the officers receiving the same noted on the stub that the certificate had been returned and the number of the certificate or certificates which were issued in lieu thereof. Certificates from number 1 to 1500 for

various numbers of bonds and in various amounts were issued, surrendered and re-issued.

These transactions took place during the years 1911, 1912, and 1913. All of the directors knew that these transactions were taking place; all of the directors had at various times received certain of these certificates. The said directors at all times during the last mentioned period held a majority in number of the shares of the capital stock issued by the said corporation.

On or about September 1st, 1911 F. M. Smith and W. S. Tevis and R. G. Hanford entered into an agreement in writing a copy of which is hereto annexed, marked exihibit "D" and is hereby referred to and made a part hereof for all purposes. [38]

On the 25th day of April, 1915, the said Ira M. Condit died in the county of Alameda, State of California; the plaintiff, Mary Ellen Kibbe is the sole owner and holder of the certificate sued upon and is the same person as the Mary Ellen Kibby mentioned in the said certificate; she is the daughter of the said Ira M. Condit.

The laws and statutes of the State of Delaware during the period from January, 1910 to date in reference to corporations are hereby referred to and made a part hereof for all purposes just as if the said laws and statutes had been offered and admitted in evidence at the trial of this action. There has been no law or statute during the last mentioned period in the State of Delaware requiring a corporation before creating or increasing any bonded indebtedness to comply with any proceedings or requirements

similar or in substance or effect alike to those set forth in Section 359 of the Civil Code of the State of California. There has never been any laws or statute of the State of Delaware requiring a two-thirds vote of the stockholders or the written assent of 2/3 of the stockholders in order to create or increase a bonded indebtedness of a corporation.

It is stipulated that the foregoing statements of facts are admitted subject to any objection that either party may have thereto on the ground that the evidence of any of the said facts is incompetent, irrelevant or immaterial.

It is further stipulated that upon the trial of the action, either of the parties thereto, may introduce such other and further evidence supplementing the statement of facts contained in the forgoing which they may care to present subject, however, to any objection that such other and further evidence is incompetent, irrelevant and immaterial, and provided that if either [39] party intends to introduce such other and further evidence, he shall notify the other party of his intention to introduce such other and further evidence at least five days before the date set for the trial of the said action.

Dated: June 24th, 1916.

HERBERT W. ERSKINE,
Attorney for Plaintiff.
R. P. HENSHALL,
Attorney for Defendant. [40]

**Exhibit "A" to Admission of Certain Facts.**

No. 4. The property and business of the company shall be managed and controlled by a Board

of eight directors, who shall at all times be stockholders, and at least one of whom shall be an actual resident of Delaware.

They shall hold office until the next annual meeting of the stockholders or until others are elected and qualified in their place and stead.

The number of directors may at any time be increased by an affirmative vote of a majority of the entire Board of Directors, at a special meeting called for that purpose, and in case of any such increase, the Board of Directors, shall have power to elect such additional Directors to hold office until the next meeting of stockholders, and until the successors of such additional directors so elected, are elected and qualified.

If the office of any Director becomes vacant, by reason of death, resignation or disqualification, the remaining Directors, by a majority vote, may elect a successor, who shall hold office for the unexpired term and until his successor is elected.

POWERS OF THE DIRECTORS.

No. 5. The Board of Directors shall have general management of the business of the Company, shall exercise the powers necessary to accomplish the purposes and object for which it is organized, as specified in its certificate of incorporation, and in addition to the powers and authorities by these By-laws expressly conferred upon them, may exercise all such powers and do all such acts and things, as may be exercised or done by the company, but subject, nevertheless, to the provisions of the Statute, of the Charter and of these [41] By-laws, and to any regula-

tion from time to time made by the stockholders, provided that no regulation so made shall invalidate any prior act of the Board of Directors which would have been valid if such regulation had not been made.

Without prejudice to the general powers conferred by the last preceding clause the powers conferred by the Certificate of Incorporation, and the other powers conferred by these By-laws, it is hereby expressly declared that the Board of Directors shall have the following powers, that is to say:

To purchase or otherwise acquire, for the Company any property, rights, or privileges which the company is authorized to acquire, at such prices and on such terms and conditions, and for such consideration as they may see fit.

At their discretion to pay for any property or rights acquired by the Company either wholly or partially in money or in stock, bonds debentures or other securities of the company.

To appoint, and at their discretion to remove or suspend, subordinate managers, officers, assistants, clerks agents and servants, permanently or temporarily, and to determine their duties, and fix, and from time to time change, their salaries or emoluments, and to require security in such instances and in such amounts as they think fit.

To confer by resolution, upon any officer of the Company the right to choose, appoint, remove or suspend such subordinate officers, agents or factors, and to determine their duties and fix, and from time to time change their salaries and emoluments.

To appoint any person or persons to accept and

hold in trust for the Company any property belonging to [42] the Company, or in which it has an interest, or for any other purpose, and to execute and do all such duties and things as may be requisite in relation to any such trust.

To create, make and issue mortgages, bonds, deeds of trust, trust agreements and negotiable or transferable instruments and securities, secured by mortgage or otherwise, and to do other acts and things necessary to effectuate the same.

To determine who shall be authorized to sign on the Company's behalf, bills, notes, receipts, acceptances, endorsements checks, releases, contracts and documents.

From time to time to provide for the management of the affairs of the Company at home or abroad in such manner as they think fit, and in particular, from time to time to delegate any of the powers of the Board of Directors to any committee, officer, or agent, and to appoint any persons to be the agents of the Company with such powers (including the power to sub-delegate) and upon such terms as may be determined.

MEETINGS OF THE STOCKHOLDERS.

No. 6. Meetings of the stockholders shall be held at the office of the Company in the City of San Francisco, State of California, or the City of Wilmington, State of Delaware, as may be determined by the Board of Directors.

Holders of Common Stock may vote at all meetings either in person or by proxy in writing. All proxies shall be filed with the Secretary of the meet-

ing before being voted upon. [43]

A majority in amount of Common Stock issued and outstanding, represented by the holders in person or by proxy, shall be requisite at all meetings to constitute a quorum for an election of Directors or the transaction of any other business.

The annual meeting of the stockholders shall be held on the 25th day of October at two o'clock, in the afternoon in each year, beginning in the year Nineteen Hundred and Eleven, if not a legal holiday, and, if a legal holiday, then on the day following, when they shall elect, by a plurality vote, by ballot, a board of eight (8) Directors to serve for one year, and until their successors are elected or chosen and qualified, each holder of Common Stock being entitled to one vote for each share of Common Stock standing registered in his or her name on the twentieth day preceding the election, exclusive of the day of such election.

MEETINGS OF DIRECTORS.

No. 7. The newly elected Directors shall meet as soon as possible after their election, at the office of the Company, in the City of San Francisco, State of California, for the purpose of organization and otherwise, and no notice of such meeting, provided a majority of the whole board shall be present, shall be necessary to the newly elected Directors in order to legally constitute the meeting.

At the first meeting after their election the Directors shall elect from among their number, a President, a First Vice-President and three other Vice-Presidents, and shall also elect a Treasurer, to hold

office for one year and until others are elected and qualified. A Secretary shall be elected or appointed who may or may not be a Director, and whose term of service shall be subject to the pleasure of the [44] Board of Directors.

Regular meetings of the Board of Directors may be held without notice at such time and place as may be determined, from time to time by resolution of the Board.

Notice of regular meetings may be mailed to each Director at his last known postoffice address by the Secretary at least five days previously.

Five Directors shall be necessary at all meetings to constitute a quorum for the transaction of business.

Special meetings of the Board may be called by the President on one day's notice to each Director, either personally or by wire; special meetings may be called in like manner on the request in writing of four Directors.

STANDING COMMITTEES.

No. 8. The Board of Directors may appoint from their number, Standing Committees and may invest them with all their own powers, subject to such conditions as they may prescribe, and all committees so appointed shall keep regular minutes of their transactions and shall cause them to be recorded in books kept for that purpose in the office of the Company, and shall report the same to the Board of Directors at their next regular meeting.

OFFICERS OF THE COMPANY.

No. 9. The officers of the Company shall consist

of a President, a First Vice-President and three other Vice-Presidents, Secretary, Treasurer, and such other subordinate officers as may from time to time be elected or appointed by the Board of Directors.

One person may hold the office of Secretary and Treasurer, and if deemed advisable by the Board of Directors, a Vice-President may hold the offices of Vice-President Treasurer or [45] a Vice-President and Secretary, but not the offices of Vice-President, Secretary and Treasurer.

OFFICERS HOW CHOSEN.

No. 10. At the first meeting after their election the Directors shall elect annually from among their own number a President and a First Vice-President and three other Vice-Presidents, and a Treasurer, to hold office for one year and until their successors are elected and qualified. They shall not be subject to removal during their respective terms of office except for cause, nor shall their term of office be diminished during their tenure. The Board of Directors shall also appoint or elect a Secretary whose term of office shall be subject to the pleasure of the Board.

DUTIES OF THE PRESIDENT.

No. 11. The President shall be the chief executive officer of the Company; he shall preside at all meetings of the Directors, he shall have general and active management of the business of the company; he shall see that all orders and resolutions of the Board of Directors are carried into effect; he shall execute all contracts and agreements authorized by the Board of Directors; shall keep in safe custody

the seal of the Company, and, when authorized by the Board of Directors to affix the seal to any instrument requiring the same, and the seal when so affixed shall be attested by the signature of the Secretary.

He shall sign all certificates of stock.

He shall have general supervision and direction of all the other officers of the Company, and shall see that their duties are properly performed.

He shall submit a report of the operations of the Company for the fiscal year to the Board of Directors at their first regular meeting in each year, and to the stockholders at [46] their annual meeting, and from time to time shall report to the Board of Directors all matters within his knowledge which the interests of the Company may require to be brought to its notice.

He hsall be *ex-officio* a member of all standing committees and shall have the general powers and duties of supervision and management usually vested in the office of the President of a corporation.

VICE-PRESIDENT.

No. 12. The First Vice-President shall be vested with all the powers and authority, and shall perform all the duties and exercise all the functions of the President, in his absence from the principal place of business, to wit; the State of California, or in case of the inability of the President, for any reason, to act; and in the event of absence or inability for any reason, of both the President and First Vice-President all the powers, duties, authority and functions of the President shall devolve upon one of the other Vice-Presidents, who shall be designated by

the First Vice-President and in the event of the absence from the State of California or the inability for any reason of the Vice-President thus selected to act, he shall in like manner designate a Vice-President to act as President.

SECRETARY.

No. 13. The Secretary shall attend all sessions of the Board of Directors and act as Clerk thereof and record all votes and the minutes of all proceedings in a book to be kept for that purpose; and shall perform all duties for the Standing Committees when required.

He shall see that proper notice is given of all meetings of the holders of Common Stock of the Company, and of the Board of Directors, and shall perform such other duties as [47] may be prescribed from time to time by the Board of Directors or the President. He shall be sworn to the faithful discharge of his duty.

TREASURER.

No. 14. The Treasurer shall keep full and accurate accounts of receipts and disbursements in books belonging to the corporation and shall deposit all money and other valuable effect in the name and to the credit of the Company, in such depositories as may be designated by the Board of Directors.

He shall disburse the funds of the Company as may be ordered by the Board of Directors, or the President, taking proper vouchers for such disbursements, and shall render to the President, and Directors, at the regular meetings of the Board of Directors or whenever they may require it, an account of

all his transactions as Treasurer and of the financial condition of the Company.

If required by the Board of Directors, he shall give the Company a bond in form and in a sum with security satisfactory to the Board of Directors, for the faithful performance of the duties of his office, and the restoration to the Company in case of his death, resignation or removal from office, of all books, papers, vouchers, money and other property of whatever kind in his possession belonging to the Company. He shall perform such other duties as the Board of Directors may from time to time prescribe or require.

Certificates of stock when signed by the President shall be countersigned by the Treasurer. He shall keep the accounts of the stock registered and transferred in such form and manner and under such regulations as the Board of Directors may prescribe. [48]

DUTIES OF OFFICERS MAY BE DELEGATED.

No. 16. In case of the absence of any officer of the Company, the Board of Directors may delegate the powers or duties of such officer to any other officer or to any Director for the time being.

EXECUTIVE COMMITTEE.

No. 25. The Board of Directors may appoint annually an Executive Committee of three persons from their own number.

The executive Committee shall not have authority to alter or amend the By-laws, but shall exercise all other powers of the Board of Directors between the meetings of said Board.

The executive Committee shall appoint a Secretary, who shall keep regular minutes of the actions of said Committee, and report the same to the Board of Directors and the Board shall adopt such report as a part of its proceedings.

The Board of Directors may designate for such Committee, a Chairman, who shall continue to be Chairman of the Committee during the pleasure of the Board.

The Board of Directors shall fill vacancies in the Executive Committee by election from the Directors, and at all times it shall be the duty of the Board of Directors to keep the membership of such committee full, with due regard to the qualifications necessary for such membership.

All action by the Executive Committee shall be reported to the Board of Directors at its meeting next succeeding such action.

The Executive Committee shall fix its own rules of procedure, and shall meet where and as provided by such rules, or by resolution of the Board of Directors, but in every case, the presence of at least two members shall be necessary to constitute a quorum. [49]

In every case the affirmative vote of a majority of all the members of the Executive Committee present at the meeting, shall be necessary to the adoption of any resolution.

The powers of this Executive Committee, during intervals between meetings of the Board of Directors shall extend to the purchase of property and the execution of legal instruments with or without the cor-

porate seal, in such manner as such Committee shall deem to be best for the interests of the Company, in *all case* in which specific directions have not been given by the Board of Directors.

During the intervals between the meetings of the Executive Committee, and subject of its review, the President of the Board of Directors and the Chairman of the Executive Committee together, shall possess and may exercise any of the powers of the Committee, except as from time to time shall be otherwise provided by resolution of the Board of Directors.

CONTRACTS.

No. 29. The Board of Directors in its discretion may submit any contract or act for approval or ratification at any annual meeting of the holders of common stock, or at any meeting of such stockholders called for the purpose of considering any such act or contract; and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the Common Stock of the Company which is present in person or by proxy at such meeting (provided that a lawful quorum of holders of Common Stock be there represented in person or by proxy) shall be as valid as binding upon the Company and upon all the stockholders as though it has been approved or ratified by every stockholder of the company. [50]

**Exhibit "D" Agreement—Between Smith et al. and Hanford.**

Agreement made this ——— day of September, 1911 between F. M. Smith of the City of Oakland, County of Alameda, State of California, W. S. Tevis

of the City of Bakersfield, County of Kern and State aforesaid, and R. G. Hanford of the City and County of San Francisco, State of California,

WITNESSETH:

That whereas said F. M. Smith did on or about the 25th day of October, 1910, enter into an agreement with said W. S. Tevis and said R. G. Hanford by the terms whereof said F. M. Smith did among other things agree to deliver to said R. G. Hanford or to the United Properties Company of California, a corporation, as his nominee not less than 75% of the total issued shares of the Oakland Terminal and San Francisco, Oakland and San Jose Consolidated Railways and of each of them,

And whereas the total issued shares of said Company are as follows:

Oakland Traction Company, 108,750, shares of common
70,500 shares of preferred.

San Francisco Oakland and San Jose Consolidated Railways,
27,500, shares of common
50,000, shares of preferred.

And whereas the amount of stocks to be delivered under said agreement by said F. M. Smith were as follows:

Oakland Traction Company, 97,437.3 shares of common
37,000.3 shares of preferred.

San Francisco, Oakland and San Jose Consolidated Railways,

26,078.5 shares of common and
32,050 shares of preferred. [51]

And whereas on the 18th day of August, 1911, deliveries had been made as follows:

Oakland Traction, 94,801 shares of common
18,337 shares of preferred.

San Francisco and San Jose Consolidated Railways,
27,300 shares of common
19,775 shares of preferred.

And whereas, certain extensions have from time to time been granted to said Smith, and he is desirous of further extension of time, in consideration of the premises and of other good and sufficient considerations, Tevis and Hanford hereby extend the time for delivery of the shares of stock remaining to be delivered by F. M. Smith until the first day of September 1912, and the said Smith hereby agrees that he will, on or before said date, make delivery of a sufficient number of shares of the capital stock of said Traction Co. and said San Francisco, Oakland and San Jose Consolidated Railway to make, together with those already delivered, not less than 66 ⅔% of the total issued stock of each of said companies, and as soon as possible thereafter, and in no event later than the first day of March, 1913, to deliver the entire balance remaining to be delivered by him, that is to say, sufficient to make 75% of the total issued stock of each of said companies, as hereinabove set forth and that he will at the time of such deliveries accept therefor the securities exchangeable therefor under said agreement hereinabove referred to between said F. M. Smith, W. S. Tevis and R. G. Hanford.

IN WITNESS WHEREOF, the parties hereto have hereunto signed their names the day and year first above-written.

(Signed) F. M. SMITH.
W. S. TEVIS.
R. G. HANFORD.

[Endorsed]: Filed Aug. 22, 1916. Walter B. Maling, Clerk. [52]

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*In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,

Defendant.

**Judgment.**

This cause having come on regularly for trial upon the 5th day of September, A. D. 1916, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation of the attorneys for the respective parties, Herbert W. Erskine, Esq., appearing on behalf of plaintiff, and R. P. Henshall, Esq., appearing on behalf of defendant; and oral and documentary evidence having been introduced on behalf of the plaintiff and no evidence having been offered on behalf of the de-

fendant, and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having rendered its oral opinion and ordered that judgment be entered in favor of plaintiff and against defendant in the sum of $15,925 and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Mary Elen Kibbe, plaintiff, do have and recover of and from United Properties Company of California, a corporation, defendant, the sum of Fifteen Thousand Nine Hundred Twenty-five and 00/100 Dollars ($15,925), together with her costs herein expended taxed at $23.03.

Judgment entered July 9, 1917.

WALTER B. MALING,
Clerk.

A True Copy, Attest:

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed July 9, 1917. Walter B. Maling, Clerk. [53]

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*In the Southern Division of the United States District Court for the Northern District of California.*

No. 15,967½.

MARY ELLEN KIBBE

vs.

UNITED PROPERTIES CO. OF CAL.

**Clerk's Certificate to Judgment-Roll.**

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 9th day of July, 1917.

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed July 9, 1917. Walter B. Maling, Clerk. [54]

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, and ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, M. O'CONNELL and HARRY W. DAVIS, as Trustees, Acting for and on Behalf of Said THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Defunct Corporation, Substituted Defendants Herein,

Defendants.

**Order Substituting Trustees as Defendants.**

It appearing to the Court that The United Properties of California, a corporation, has forfeited its charter under the laws of the State of California for the non-payment of taxes in the month of March, 1917, and that Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis were the directors in office at the time of such forfeiture and are the persons charged by law as trustees with the duty of winding up its affairs;

NOW, THEREFORE, on motion of R. P. Henshall, IT IS ORDERED: That Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, as trustees for and on behalf of The United Properties Company of California, a defunct corporation, be, and they hereby are substituted as defendants in the above-entitled action in place and stead of the original defendant, The United Properties Company of California [55] and that any and all proceedings hereafter be taken and had in the name of said Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, as trustees for and on behalf of said The United Properties Company of California, a defunct corporation.

Done and dated this 7th day of January, 1918.

OSCAR A. TRIPPET,
Judge.

[Endorsed]: Filed Jan. 7, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [56]

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, and ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, M. O'CONNELL and HARRY W. DAVIS, as Trustees, Acting for and on Behalf of Said THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Defunct Corporation, Substituted Defendants Herein,

Defendants.

**Engrossed Bill of Exceptions to be Used on Defendant's Writ of Error to the United States Circuit Court of Appeals. [57]**

BE IT REMEMBERED that the above-entitled action came on duly and regularly for hearing before the above-entitled court on Tuesday, September 5, 1916, Hon. William C. Van Fleet, Judge, sitting without a jury, a jury trial of said action having been duly waived in the writing signed by the parties and filed in the action as required by law.

That such actions were by an order of the Court consolidated for trial, which said order was duly given and made in said actions, and in each of them, prior to the commencement of the trial thereof by consent of the parties hereto.

That this bill of exceptions is presented and is settled as a bill of exceptions in each of said actions.

On the trial of said action Herbert W. Erskine, Esq., appeared as attorney for the plaintiff, and R. P. Henshall, Esq., as attorney for the defendant, and thereupon the following proceedings were had.

**Testimony of William S. Tevis, for Plaintiff.**

WILLIAM S. TEVIS, a witness, called and sworn on behalf of plaintiff, testified as follows:

I am not at the present time an officer in The United Properties Company. I was vice-president of The United Properties Company. I do not recall the date when I resigned. I believe it was up to and through the year 1913. I am a stockholder of that company and I know the signature of Mr. Raycraft, Mr. C. R. Alberger, Mr. W. R. Alberger, Mr. F. W. Frost and Mr. J. K. Moffitt

Mr. HENSHALL.—I will admit, subject to my objection stated in the admission of facts, that the signatures upon any certificates that you produce, Mr. Erskine, are the correct [58] signatures of the persons of whom they purport to be the signatures and I will admit that at the time these officers signed these certificates they were the officers they purported to be, as represented in the certificates; that the seal is affixed to each one of the certificates and that any certificates that you offer in evidence are the

certificates sued on in this action.

The certificates referred to in the complaint on file in the above-entitled action were offered in evidence and admitted in evidence and read into evidence; that they are similar to the exhibits attached to and made a part of the complaint on file except as to dates, amounts, numbers and signatures; that they were for the amounts, bore the same numbers and dates and were signed by the same officers as those referred to and described in the complaint on file in the above-entitled action, and that all of said certificates bore the seal of the said defendant corporation; that the said certificates correspond in dates, amounts, numbers, names of payees and names of officers signing the same, with the certificates referred to in the allegations of the complaint on file in the above-entitled action.

The WITNESS (Continuing.) I cannot say that I am familiar with the minutes of the meetings of the directors of the United Properties Company, but I would recognize the minute-book if I saw it. The book that is shown me is a copy of the minutes of the directors; it is one of the copies, one of the originals; I believe we kept three original copies of the minutes; it was, in other words, a triplicate original. [59]

Mr. ERSKINE.—Will you admit that on February 24, 1911, the meeting was held, and admit the minutes of it?

Mr. HENSHALL.—I admit that, but I interpose the objection that it is immaterial, irrelevant and incompetent.

Mr. ERSKINE.—I will offer in evidence these minutes of the special meeting of the Board of Directors of the United Properties Company, at San Francisco, Friday, February 24, 1911, and ask that they be considered as read.

Mr. HENSHALL.—I will make the same objection. My objection is that it does not have a tendency to show that the company was authorized to issue the instruments upon which suit was brought.

The COURT.—I will take the evidence subject to the objection.

Mr. HENSHALL.—Exception.

DEFENDANT'S EXCEPTION NO. 1.

The minutes of the special meeting referred to were thereupon read in evidence, subject to the objection aforesaid, and were and are in the words and figures following, to wit: [60]

**Minutes of Special Meeting of Board of Directors of United Properties Co. held February 24, 1911.**

"FOURTH AND SPECIAL MEETING OF THE BOARD OF DIRECTORS OF THE UNITED PROPERTIES COMPANY OF CALIFORNIA.

San Francisco, California,
Friday, February 24, 1911.

The Special Meeting of the Board of Directors of THE UNITED PROPERTIES COMPANY OF CALIFORNIA was held on Friday, February 24, A. D. 1911, at the hour of 2:30 o'clock in the afternoon of said day, at the office of said corporation, same being located at room number 501 on the fifth

floor of the building known as 57 Post Street, in the city and County of San Francisco, State of California. Said special meeting was called and held pursuant to a written notice thereof given by the President of the corporation, which said written notice was duly served upon each member of the Board of Directors by the Secretary of the corporation. Said meeting was called and held for the purpose of transacting any and all business which said Board of Directors had power to transact at any regular meeting thereof.

There were present Messrs. F. M. Smith, William S. Tevis, R. G. Hanford, C. B. Zabriskie, Gavin Mcnab, W. R. Alberger, Dennis Searles, constituting a majority of the Board.

Absent: E. W. Davis.

Minutes of the third and regular meeting of the Board of Directors, held on the 14th day of February, 1911, were read and approved.

On motion duly made and seconded, it was

RESOLVED, that the minutes of all meetings held by the incorporators, stockholders and Board of Directors, or Executive Committee, of this corporation, be written out in triplicate by the Secretary of this corporation, the first triplicate *to kept* in the office of the company, the second triplicate in the safe deposit box of the Company, in the City and County of San Francisco, State of California, and the third triplicate in the safe deposit box of the Company located in the City of Oakland, County of Alameda, State of California, or such other de-

posit boxes as may be hereinafter rented by the Company for this purpose;

FURTHER RESOLVED, that the book or books containing the second triplicate of such minutes, be designated as Second Triplicate Book of Minutes of the meetings of the Boards of Directors, Stockholders, Executive Committee, or otherwise, of said corporation, as the case may be;

FURTHER RESOLVED, that the book or books containing the third triplicate of such minutes, be designated as Third Triplicate Book of Minutes of the meetings of the Board of Directors, Stockholders, Executive Committee, or otherwise, of said corporation, as the case may be;

FURTHER RESOLVED, that the book of By-Laws of said corporation be made in triplicate, and kept in the same manner by the Secretary of the corporation.

Upon motion duly made and seconded, it was

RESOLVED, that F. W. Frost be and he is hereby appointed Assistant Treasurer of The United Properties Company of California. [61]

RESOLVED, that First Vice-President, W. S. Tevis, and Vice-President, R. G. Hanford, be and they are hereby authorized and empowered, on behalf of this Company, to enter into negotiations for the purpose of acquiring such electric lighting and distributing, or other, plants or properties and franchises as they may think desirable; or to acquire shares of stock in corporations owning or controlling such plants or properties or franchises.

The President thereupon laid before the Board a

communication from R. G. Hanford, wherein he offered to transfer to this corporation certain shares of the capital stock of the following corporations, to-wit:

East Shore and Suburban Railway Company,
The Union Water Company of California,
United Light and Power Company,
Sierra Water and Supply Company,
The Sacramento Short Line,
The San Jose Short Line,
Pacific Terminal Company,
Santa Clara Land and Water Company,
Consolidated California Land Company,
Bay Cities Water Company.

at and for the price of $145,346,730, payable as follows, to-wit:

$57,579,200, in Common Shares of the capital stock of this corporation, at par.

$33,601,400, in Preferred Shares of the capital stock of this corporation, at par.

$10,411,000, in bonds of the capital stock of this corporation, at par, and

$43,755,130, in Convertible Debenture Bonds of the capital stock of this corporation, at par.

The Secretary being directed by the President to read the communication, did so.

After a full discussion of the offer contained in said communication, and of the value of the shares of stock in the various corporations offered by Mr. Hanford, it was, upon motion duly made and seconded and carried by the unanimous vote of all the

Directors present, excepting Mr. Hanford who did not vote.

RESOLVED that the stocks offered by Mr. R. G. Hanford in his communication, a copy whereof is hereinafter spread upon these minutes, are of a value of not less than $145,346.730;

FURTHER RESOLVED, that the said offer be, and the same is, hereby accepted, and that the proper officers of this Company be, and they are, hereby authorized and directed to issue such shares of stock, bonds, and convertible debenture bonds of this Company, and to do all such other acts and things, as may be necessary to effect the said exchange;

FURTHER RESOLVED, that a copy of said communication of R. G. Hanford be spread upon the minutes of this meeting.

The said communication is in words and figures following: [62]

"San Francisco, Cal.,
February 24th, 1911.

The United Properties Company of California,
San Francisco, California.

Gentlemen:

I am able to transfer and deliver to you more than 75% of the subscribed capital stock of the following named corporations, to-wit:

East Shore and Suburban Railway Company
The Union Water Company of California
United Light and Power Company
Sierra Water Supply Company
The Sacramento Short Line
The San Jose Short Line

The Pacific Terminal Company
Santa Clara Land and Water Company, and
Consolidated California Land Company;

and over 73% of

The Bay Cities Water Company.

That is to say, the capital stock of each of these companies, authorized and outstanding, and the number of shares which I am able to deliver to you are as follows:

EAST SHORE AND SUBURBAN RAILWAY COMPANY:

Authorized capital stock, $1,000,000.
10,000 shares, par value $100 each.

Of this stock there has been issued and is now outstanding

$336,000 par value.

and I am able to deliver the same to you.

THE UNION WATER COMPANY OF CALIFORNIA:

Authorized capital stock, $5,000,000.
500,000 shares, par value $10 each.
Divided into 300,000 shares common.
200,000 shares preferred.

All of this stock has been issued and is now outstanding, and I am able to deliver the same to you.

UNITED LIGHT AND POWER COMPANY:

Authorized capital stock, $6,000,000.
600,000 shares, par value $10 each.
Divided into 400,000 shares common.
200,000 shares preferred.

Of this stock there has been issued and is now outstanding.

$3,982,130 par value common
$1,996,100 par value preferred;
and I am able to deliver the same to you.

SIERRA WATER SUPPLY COMPANY:
Authorized capital stock, $5,000,000.
50,000 shares, par value $100 each.
All of this stock has been issued and is now outstanding, and I am able to deliver the same to you.

THE BAY CITIES WATER COMPANY:
Authorized capital stock, $10,000,000.
100,000 shares, par value $100 each.
All of this stock has been issued and is now outstanding, of which I am able to deliver $7,390,414 par value to you. [63]

THE SACRAMENTO SHORT LINE:
Authorized capital stock, $10,000,000.
1,000,000 shares, par value $10 each.
Divided into 600,000 shares common
400,000 shares preferred.
All of this stock has been issued and is now outstanding, and I am able to deliver the same to you.

THE SAN JOSE SHORT LINE:
Authorized capital stock, $8,000,000.
800,000 shares, par value $10 each.
Divided into 400,000 shares common
400,000 shares preferred.
All of this stock has been issued and is now outstanding, and I am able to deliver the same to you.

PACIFIC TERMINAL COMPANY:
Authorized capital stock, $5,000,000.
50,000 shares, par value $100 each.

Divided into 25,000 shares common
25,000 shares preferred.

All of this stock has been issued and is now outstanding, and I am able to deliver the same to you.

SANTA CLARA LAND AND WATER COMPANY:

Authorized capital stock, $10,000,000.
1,000,000 shares, par value $10 each.

All of this stock has been issued and is now outstanding, and I am able to deliver the same to you.

CONSOLIDATED CALIFORNIA LAND COMPANY:

Authorized capital stock, $10,000,000.
1,000,000 shares, par value $10 each.

All of this stock has been issued and is now outstanding, and I am able to deliver the same to you.

For the consideration hereinafter named, I hereby offer to transfer and deliver to you certificates, duly issued and endorsed for all of the said shares of stock so controlled by me, that is to say: Shares of the following named corporations and having the following par value, respectively:

| | | |
|---|---|---|
| East Shore and Suburban Railway Co. | | $ 333,000 |
| The Union Water Company of Cal. | | |
| | $3,200,000 common | |
| | 2,000,000 prefd. | 5,000,000 |
| United Light and Power Co. | | |
| | 3,982,130 common | |
| | 1,996,100 prefd. | 5,978,250 |
| Sierra Water Supply Company | | 5,000,000 |
| The Bay Cities Water Company | | 7,390,414 |

| | | |
|---|---|---|
| The Sacramento Short Line | | |
| | $6,000,000 common | |
| | 4,000,000 preferred | 10,000,000 |
| The San Jose Short Line | | |
| | 4,000,000 common | |
| | 4,000,000 preferred | 8,000,000 |
| The Pacific Terminal Co. | | |
| | 2,500,000 common | |
| | 2,500,000 preferred | 5,000,000 |
| Santa Clara Land and Water Co. | | 10,000,000 |
| Consolidated California Land Co. | | 10,000,000 |
| | Total, | $66,706,644 |

[64]

For and in exchange for all of said stock, and as the consideration for the delivery thereof to you, I hereby offer to accept from you the following amounts of the common and preferred shares of the capital stock of your company, The United Properties Company of California, and the following amounts of your First Mortgage Bonds and Convertible Debenture Bonds, all of which must be delivered to me as fully paid, to wit:

| | |
|---|---|
| FIRST: 575,792 shares of the fully paid common stock of your company having a par value of..... | $ 57,579,200 |
| SECOND: 336,014 shares of the fully paid preferred stock of your company having a par value of..... | 33,601,400 |
| THIRD: 10,411 of the fully paid first mortgage bonds of your company having a par value of..... | 10,411,000 |

FOURTH: 43,755.15 of the fully paid Convertible Debenture Bonds of your company having a par value of ..... 43,755,130

Total.....$145,346,730

As a further consideration for this exchange, I must require you to enter into an agreement with me whereby you shall undertake at any time on or before July 1, 1911, to exchange with any of the stockholders of The Bay Cities Water Company, whose stock shall not be transferred and delivered to you by me, the following amount of your shares of stock for shares of stock of The Bay Cities Water Company owned by them, respectively, that is to say:

For each $10 par value of the shares of the common stock of The Bay Cities Water Company received by you, you shall issue in exchange therefor,

$3 par value of your common stock.

$1 par value of your preferred stock; and

$1 par value of your convertible debenture bonds.

If this offer is accepted by you, the exchange of stock herein contemplated shall be made and consummated within thirty days from the date of such acceptance. If your company is unable, within said time, to issue and deliver to me the permanent First Mortgage Bonds or Convertible Debenture Bonds of your company, hereinabove mentioned, I agree to accept from you, in lieu thereof, certificates for such bonds authorized and issued by you, which certificates shall provide that the holders thereof shall be entitled to receive from you the said First Mortgage

Bonds and Convertible Debentures Bonds as soon as the same are executed, issued and ready for delivery, together with all interest coupons attached to said First Mortgage Bonds entitling the holder thereof to interest at the rate of five per cent per annum from and after the 1st day of January, 1911.

Yours truly,

(Signed) R. G. HANFORD.

The President thereupon laid before the Board a communication from Mr. R. G. Hanford, wherein he offered to transfer to this corporation certain shares of the capital stock of the following corporations, to wit:

Oakland Traction Company, and San Francisco, Oakland and San Jose Consolidated Railway [65] at and for the price of $12,413,076, being the shares of stock described in said communication as "now deliverable" stock, payable as follows, to wit:

$5,358,037, in common shares of the capital stock of this corporation, at par;

4,696,460, in preferred shares of the capital stock of this corporation, at par; and

2,358,579, in Convertible Debenture Bonds of the capital stock of this corporation, at par.

PROVIDED, HOWEVER, that his offer was made upon the condition that this corporation should also agree and undertake with him to make a similar exchange, share for share, at any time on or before February 16, 1912, with the owners of certain other shares of stock of said two corporations, now in pledge, and, also, on or before July 1, 1911, with the owners of any or all other shares of stock in said

corporations willing to so exchange their said shares upon the said basis.

The Secretary being directed by the President to read the communication, did so.

After a full discussion of the offer contained in said communication, and of the value of the shares of stock in the two corporations, above referred to, offered by Mr. Hanford, it was, upon motion duly made and seconded and carried by the unanimous vote of all the Directors present, excepting only Mr. Hanford himself who did not vote.

RESOLVED, that the shares of stock now offered to this corporation by Mr. R. G. Hanford, under the designation "Now Deliverable" stock, in his communication, a copy whereof is hereinafter spread upon these minutes, are of a value of not less than $12,413,076, and that the shares of stock designated in said communication as "Pledged" Stock and "Outsiders'" Stock, are equivalent in value, share for share, with the shares therein designated as "Now Deliverable" stock, the value whereof is now deemed to be as above set forth; and

FURTHER RESOLVED, that the said offer be, and the same is, hereby accepted, and that the proper officers of this Company be, and they are, hereby authorized and directed to issue such shares of stock, bonds, and convertible debenture bonds of this company, and to do all such other acts and things, as may be necessary to effect the said exchange;

FURTHER RESOLVED, that a copy of said communication of said R. C. Hanford be spread upon the minutes of this meeting.

The said communication is in words and figures as follows:

San Francisco, Cal., February 24th, 1911.

The United Properties Company of California,
San Francisco, California.

Gentlemen:

The San Francisco, Oakland and San Jose Consolidated Railway is a corporation organized and existing under the laws of the State of California, having a capital stock of $7,750,000, divided into 77,500 shares of the par value of $100 each, of which 27,500 shares is common stock and 50,000 shares is preferred stock. All of these shares of [66] stock are fully paid and are now outstanding.

I control and can deliver to you at the present time certificates for 11,247½ shares of said common stock and 24,050 shares of said preferred stock (hereinafter referred to as Now Deliverable stock), and the owners of 14,831 other shares of said common stock and 8,000 other shares of said preferred stock (hereinafter referred to as Pledged Stock) have agreed with me to exchange all of said shares of said stock for fully paid shares of the stock and fully paid Convertible Debenture Bonds of your Company, on the basis hereinafter specified, as soon as they may redeem them from a certain pledge, but in any event on or before the 18th day of February, 1912. Besides the shares of stock above mentioned there are outstanding and in the hands of other parties, $142,150 par value of said common stock and $1,795,000 par value of said preferred stock (herein-

after referred to as Outsiders' stock), of said Company.

The Oakland Traction Company is a corporation organized and existing under the laws of the State of California, having a capital stock of $17,925,000, divided into 179,250 shares of the par value of $100 each, of which 109,750 shares is common stock and 70,500 shares is preferred stock. All of these shares of stock are fully paid and are now outstanding.

I control and can deliver to you at the present time certificates for 33,933.3 shares of said common stock and 2,348.3 shares of said preferred stock (hereinafter referred to us as Now Deliverable stock), and the owners of 63,454 other shares of said common stock and 27,652 other shares of said preferred stock (hereinafter referred to as Pledged stock), have agreed with me to exchange all of said shares of said stock for fully paid shares of the stock and fully paid Convertible Debenture Bonds of your Company on the basis hereinafter specified, as soon as they may redeem them from a certain pledge, but in any event on or before February 18th, 1912. Besides the shares of stock above mentioned there are outstanding and in the hands of other parties, $1,131,270 par value of said common stock, and $3,349,970 par value of said preferred stock (hereinafter referred to us as Outsiders' stock) of said Company.

I hereby offer to transfer and deliver to you certificates duly issued and endorsed for said 11,247½ shares of Now Deliverable common stock and said 24,050 shares of Now Deliverable preferred stock of said San Francisco, Oakland and San Jose Consoli-

dated Railway; and said 33,983.3 shares of Now Deliverable common stock and said 9,348.3 shares of Now Deliverable preferred stock of said Oakland Traction Company, and all of my right, title and interest in and to said 14,831 shares of Pledged common stock and said 8,000 shares of Pledged preferred stock of said San Francisco, Oakland and San Jose Consolidated Railway, and all of my right, title and interest in and to said 63,454 shares of Pledged common stock and said 27,652 shares of Pledged preferred stock of said Oakland Traction Company, in consideration and in exchange for your Company issuing and delivering to me the following amounts of the common and preferred shares of the capital stock of your corporation, The United Properties Company of California, and the following amounts of your Convertible Debenture Bonds, all of which must be delivered to me as fully paid: [67]

| | |
|---|---|
| FIRST: 535,803.7 shares of the fully paid common stock of your Company, having a par value of..... | $ 5,358,037 |
| SECOND: 469,646 shares of the fully paid preferred stock of your Company, having a par value of..... | 4,696,460 |
| THIRD: 2,358,579 of the fully paid Convertible Debenture Bonds of your Company, having a par value of ..... | 2,358,579 |
| Total..... | $12,413,076 |

And for the further consideration of your agreeing and undertaking with me to, at any time on or

before February 18, 1912, exchange with the owners of said 14,831 shares of Pledged common stock and said 8,000 shares of Pledged preferred stock of said San Francisco, Oakland and San Jose Consolidated Railway, and with the owners of said 63,454 shares of Pledged common stock and said 27,652 shares of pledged preferred stock of said Oakland Traction Company whose shares of stock are now in pledge and who have agreed to exchange said shares of stock on or before said date, and also to exchange with any and all of the owners of the Outsiders' stock of said companies, or either of them, on or before July 1st, 1911, the *the* following amount of your fully paid shares of common and preferred stock and Convertible Debenture Bonds for the shares of stock of said companies owned by them respectively, or any part thereof, that is to say:

For each $100 par value of the shares of the common stock of said San Francisco, Oakland and San Jose Consolidated Railway delivered to you, you shall deliver in exchange therefor $100 par value of the fully paid shares of the common stock of your Company, $30 par value of the fully paid shares of the preferred stock of your Company, and $30 par value of the fully paid Convertible Debenture Bonds of your Company, and for each $100 par value of the shares of the preferred stock of said San Francisco, Oakland and San Jose Consolidated Railway delivered to you, you shall deliver in exchange therefor $25 par value of the fully paid shares of the common stock of your Company, $100 par value of the fully paid shares of the preferred stock of your

company, and $30 par value of the fully paid Convertible Debenture Bonds of your Company; and

For each $100 par value of the shares of the common stock of said Oakland Traction Company delivered to you, you shall deliver in exchange therefor $100 par value of the fully paid shares of the common stock of your Company, $30 par value of the fully paid shares of the preferred stock of your Company, and $30 par value of the fully paid Convertible Debenture Bonds of your Company, and for each $100 par value of the shares of the preferred stock of said Oakland Traction Company delivered to you, you shall deliver in exchange therefor $25 par value of the fully paid shares of the common stock of your Company, $100 par value of the fully paid shares of preferred stock of your Company, and $30 par value of the fully paid Convertible Debenture Bonds of your Company.

In other words, if this proposition is accepted and the entire exchange shall be perfected, you will receive the following shares of stock of said companies, to wit: [68]

SAN FRANCISCO, OAKLAND & SAN JOSE CONSOLIDATED RAILWAY:

Common Stock.

| | |
|---|---|
| Now Deliverable stock, par value..... | $ 1,124,750 |
| Pledged stock *of* be delivered on or before Feb. 18, 1912, par value..... | 1,483,100 |
| Outsiders' stock, exchangeable on or before July 1, 1911, par value..... | 142,150 |
| Total..... | $ 2,750,000 |

Preferred Stock.

| | |
|---|---|
| Now Deliverable stock, par value | $ 2,405,000 |
| Pledged stock to be delivered on or before Feb. 18, 1912, par value | 800,000 |
| Outsiders' stock exchangeable on or before July 1, 1911, par value | 1,795,000 |
| Total | $ 5,000,000 |

OAKLAND TRACTION COMPANY:

Common Stock.

| | |
|---|---|
| Now Deliverable stock, par value | $ 3,398,300 |
| Pledged stock to be delivered on or before Feb. 18, 1912, par value | 6,345,400 |
| Outsiders' stock exchangeable on or before July 1, 1911, par value | 1,131,270 |
| Total | 10,875,000 |

Preferred Stock.

| | |
|---|---|
| Now Deliverable stock, par value | $ 934,830 |
| Pledged stock to be delivered on or before Feb. 18, 1912, par value | 2,765,200 |
| Outsiders' stock exchangeable on or before July 1, 1911, par value | 3,349,970 |
| Total | $ 7,050,000 |

And you will issue in exchange therefor the following amounts in par value of the fully paid shares and bonds of your company, said

THE UNITED PROPERTIES COMPANY OF CALIFORNIA:

Common Stock.

| | |
|---|---|
| For Now Deliverable common stock of both companies, par value | $ 5,358,037 |
| For Pledged common stock of both companies to be delivered on or before Feb. 18, 1912, par value | 8,596,378 |
| For Outsiders' common stock of both companies exchangeable on or before July 1, 1911, par value | 2,683,085 |
| Total | $16,637,500 |

Preferred Stock.

| | |
|---|---|
| For Now Deliverable preferred stock of both companies, par value | $ 4,696,460 |
| For the Pledged preferred stock of both companies to be delivered on or before February 18, 1912, par value | 5,913,790 |
| For Outsiders' preferred stock of both companies exchangeable on or before July 1, 1911, par value | 5,527,250 |
| Total | $16,137,500 |

[69]

CONVERTIBLE DEBENTURE BONDS.

| | |
|---|---|
| For Now Deliverable common and preferred stock of both companies, par value | $2,358,579 |
| For the Pledged common and preferred stock of both companies to be deliv- | |

ered on or before Feb. 18, 1912, par value ..... 3,418,093

For Outsiders' common and preferred stock exchangeable on or before July 1, 1911, par value..... 1,925,828

Total.....$7,702,500

If this proposition is accepted by you I will assign to you my contracts with the owners of the pledged stock of both companies hereinbefore mentioned, and all of my right, title and interest thereunder, and you shall agree to make the exchanges therein provided for and hereinabove mentioned, but under no circumstances will I be liable to you in any way for any failure on the part of said stockholders to exchange their stock pursuant to the terms of said agreement or otherwise, nor shall the exchange of the shares of stock and bonds proposed to be made at the present time be affected in any manner or way by any such failure.

I have no agreement with the owners of the shares of stock hereinabove designated as outstanding and in the hands of other parties, but you shall, nevertheless, agree with me to make the exchanges hereinabove provided for with them, or any of them willing so to do, on or before July 1, 1911.

Yours truly,

(Signed) R. G. HANFORD.

The Secretary announced to the Board that he had received, from the office of the attorney for the corporation, information to the effect that the Certificate of Incorporation of the Company had been

amended by the incorporations, and that the original Amended Certificate of Incorporation was filed in the office of the Secretary of States of the State of California, at 9 o'clock A. M., on the 24th day of February, 1911, and that a copy thereof, certified by the Secretary of State, was filed for record on the morning of the same day in the office of the Recorder of New Castle County, State of Delaware; that this action had been taken pursuant to the informal request and with the approval of all of the officers, directors and stockholders of the company, and reminded them that the principal object of the amendment was to omit from the charter all provision for convertible shares of stock, and hence to increase the number of common shares of stock; and laid before the Board a telegram announcing the filing of the Amended Certificate, as above stated; and also presented to the Board, for examination, a copy of the Amended Certificate of Incorporation, as filed and recorded.

It was called to the attention of the Board that under the laws of the State of Delaware the incorporators were granted power to amend the Certificate of Incorporation before the payment of any part of the capital of the company, and that such powers doubtless expired upon the payment of any part of such capital; and further attention was called to the fact that stock certificates had been made out as of earlier dates than the date of the amendment of the Certificate of Incorporation. In explanation of this, the [70] Secretary stated that while it was true that stock certificates had been

made out under dates prior to the date of the amendment of the Certificate of Incorporation, none of them had in fact been paid for, nor had any part of the consideration for same been paid, and that the certificates were so made out by inadvertence and in anticipation of certain transactions which were being negotiated, and which, if carried out, it would be desirable to consummate without delay.

Whereupon upon motion duly made, seconded and unanimously carried by the vote of all the Directors, present, the Directors representing all of the subscribed shares of the capital stock of the Company, except only the shares subscribed by the incorporators who had signed said Amended Certificate of Incorporation, of which said incorporators Mr. C. B. Zabriskie is also a Director; and it appearing that no part of the capital of said corporation had been paid, and that all of the declarations set forth in the certificate of the incorporators contained in the Amended Certificate of Incorporation were true, it was

RESOLVED that the Amendments, as the same appear from the said Amended Certificate of Incorporation be, and the same are hereby accepted, and that the said Amended Certificate of Incorporation, and the action of the incorporators in filing and recording the same be, and the same are hereby approved, ratified and confirmed.

The said Amended Certificate of Incorporation is in the words and figures following, to wit:

AMENDED CERTIFICATE OF INCORPORATION OF
THE UNITED PROPERTIES COMPANY OF CALIFORNIA.

THIS IS TO CERTIFY, that we the undersigned do hereby associate ourselves to establish and enter into a company, under and by virtue of the provisions of an Act of the General Assembly of the State of Delaware, entitled "An Act Providing a General Corporation Law," and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names; and we do hereby unite in the following Amended Articles of Incorporation; and we do hereby certify

FIRST: The name of the company is

THE UNITED PROPERTIES COMPANY OF CALIFORNIA.

SECOND: The location of the principal office in this State is the City of Wilmington, County of New Castle. The name of its resident agent therein and in charge thereof, is DELAWARE TRUST COMPANY, residing at said City of Wilmington, County of New Castle.

THIRD: The objects for which this company is formed and the nature of the business proposed to be transacted by it are

(a) To construct, equip, improve, work, develop, manage or control public works, and conveniences of all kinds, including railways, operated by steam, electricity, or any other motive power, docks, har-

bors, piers, wharves, canals, reservoirs, embankments, improvements, sewage, drainage, sanitary, water, gas, electric light, power, heat, telephonic, telegraphic, and power supply works, also hotels, warehouses, markets and public buildings [71] tunnels bridges, viaducts, and all other works or conveniences of public use or utility; to acquire, construct, equip, manage, control and operate line or lines of Railroads built or to be built in the States of California, or in any other state in the United States, with the right to construct branches or extensions into or through said State of California and into other states and territories, when and as the growth of the business of said company and the communities in the vicinity of said railroad, or railroads, shall require.

(b) To establish, promote and carry on the business of transportation in all its branches of passengers and of freight, by means of said railroad or railroads, and to engage in the business of a common carrier in all its branches.

(c) To apply for, purchase, or otherwise acquire, any contracts and concessions, for or in relation to the construction, execution, carrying out, equipment, improvement, management, administration, or control of public works, and conveniences, and to undertake, execute, carry out, dispose of, or otherwise turn to account the same.

(d) To purchase or otherwise acquire, issue, reissue, sell, pledge and deal in shares of stock of other corporations, stocks, bonds and bonds of other corporations, debentures, and securities of all kinds, and

to make and execute contracts of guaranty or security for the payment of the dividends or interest due thereon, or otherwise, in relation thereto.

(e) To take, acquire, buy, hold, own, sell, lease, mortgage, improve, cultivate, and otherwise deal in and dispose of real estate; to take acquire, buy, hold, own, hire, lease, mortgage, pledge and otherwise deal in and dispose of all kinds of personal property, chattels, and chattels real, choses in action, gold, silver and other ores; to purchase, take, acquire, buy, hold, own sell, lease, mortgage and otherwise deal in and dispose of all kinds of mines, minerals and mineral rights; to take, acquire, appropriate, purchase, sell, store, supply and furnish water for irrigation, manufacturing, mining and domestic uses, and for any other purpose to which water can be applied as a use; to construct and maintain reservoirs, dams, canals, ditches, flumes, and pipe-lines, and all other works necessary or convenient for the catchment, diversion, storage, distribution or use of water; and to take, acquire, buy, hold, own, sell, lease, mortgage and otherwise deal in and dispose of the same, and rights to water and riparian rights; to purchase, operate, construct, sell, lease, mortgage, and otherwise dispose of viaducts, ferries, wharves, chutes, piers, canals and ditches for draining, agriculture, mining and navigation and other purposes; to construct and erect buildings, to take, acquire, purchase, sell, lease, mortgage, construct, erect, hold, maintain and conduct hotels and lodging houses and all business incident thereto and connected therewith; to buy, sell, mortgage, construct, maintain and

charter vessels propelled by means of sails, steam, electricity or other motive power, and to navigate the same in all the navigable waters of the earth; to engage in, conduct and carry on manufacturing, stone quarrying, mining, mercantile, mechanical, and commercial business in all their branches; to issue debenture bonds and other evidences of indebtedness of whatever kind or nature, or bonds, whether secured or unsecured, by mortgage or mortgages, or trust deed or trust deeds, or otherwise, upon the property and franchises, or any part thereof, of the said Company, or otherwise, and to sell, pledge, or otherwise dispose of or use the same for the purpose of obtaining money with which to enlarge or carry on the [72] business and to accomplish the objects and purposes, or any of them, of this company; to purchase, acquire, hold, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of shares of the capital stock of this or any other corporation or corporations, created under the laws of this or any other State or Country, and to exercise, while owner of such stocks, all the rights, powers and privileges, including the right to vote thereon, which natural persons being the owners of such stock, might, could, or would exercise; to purchase, acquire, hold, sell, assign, transfer, mortgage, pledge, exchange or otherwise dispose of any securities or evidences of debt created by any other corporation of this or any other State or Country, in the same manner and to the same extent as natural persons being the owners thereof, might, could or would lawfully do; and in general to engage in any and all

lawful business whatever necessary or convenient in connection with the business of said company, with the right to construct, lease, maintain, and operate railroads under traffic or any other arrangement, and to own, operate and maintain ship lines, vessel lines or other lines for transportation, and to any and every act or acts, thing or things, incidental to, growing out of or connected with or incidental to said business or any part thereof.

(f) To subscribe for, purchase, invest in, hold, own, assign, pledge and otherwise dispose of shares of capital stock, bonds, mortgages, debentures, notes and other securities, obligations, contracts and evidences of indebtedness of corporations of the States of Delaware and California, or of any other State, including corporations which own, operate or lease, or which are organized for the purpose of constructing, owning, operating or leasing street surface railroads, elevated railroads, rapid transit railroads, underground railroads, tunnels, bridges, tunnel railroads, railway terminals, or railroads of any character or description, in the States of Delaware and California, or any territory adjacent thereto, and corporations engaged in furnishing or organized to furnish electricity for any lawful purposes or power in any form, and corporations whose funds are or may be invested in the shares of stock, bonds or other securities of any corporations of the character hereinbefore described; to exercise in respect of any such shares of stock, bonds or other securities of corporations, any and all rights, powers and privileges of individual ownership, including the right to vote, to

issue bonds and other obligations, and to secure the same by pledging or mortgaging the whole or any part of the property of the company, and to sell or pledge such bonds and other obligations for proper corporate purposes, and to do any and all other lawful acts and things in connection therewith tending to increase the value of the property at any time held by the company.

(g) To apply for, patent, purchase, lease, or otherwise acquire, and to register, hold, own, and use, any and all trademarks, trade secrets, processes, formula, inventions and improvements, capable of being used in connection with the work of the company, whether secured under letters patent in the United States, or elsewhere, or otherwise, and to use, operate and manufacture under the same, and to sell, assign, grant licenses in respect of, or otherwise dispose of and turn the same to the account and profit of the company.

(h) To acquire the good will, rights and property, and to undertake the whole or any part of the assets and liabilities, or either thereof, of any person, firm, association or corporation, [73] and to pay for the same in cash, stock or bonds of this company, or otherwise.

(i) To enter into, make, perform and carry out contracts of every kind, for any lawful purpose, without limit as to amount, with any person, firm, association or corporation, and to draw, make, accept, endorse, guarantee, discount, execute and issue promissory notes, bills of exchange, warrants and other negotiable or transferable instruments; to pur-

chase, hold and issue the shares of its own capital stock.

(j) To have offices, conduct its business and promote its objects, within or without the State of Delaware, in other States, the District of Columbia, the Territories and colonial dependencies of the United States, and in foreign countries, without restriction as to place or account; and unlimitedly to hold, purchase, mortgage and convey real and personal property in the State of Delaware and as well in all other States and Territories or in foreign countries.

(k) To do any and all things set forth in this certificate as objects, purposes, powers or otherwise, to the same extent and as fully as natural persons might do, and in any part of the world, as principals, agents, contractors, trustees, or otherwise, and either alone or in company with others.

FOURTH: The total authorized capital stock of this Company is Two Hundred Million (200,000,000 Dollars, divided into Two Million (2,000,000) shares of the par value of One Hundred (100) Dollars each, and the said Two Million (2,000,000) shares are divided into the following two classes; (a) Preferred stock, and (b) Common stock.

The Preferred stock of said Company shall consist of Five Hundred Thousand (500,000) shares of One Hundred (100) Dollars each, and the Common stock of said Company shall consist of One Million five hundred thousand (1,500,000) shares of the par value of One Hundred (100) Dollars each.

A. The terms, conditions, limitations and provi-

sions upon which said Preferred stock is issued are as follows:—

1. The holders of Preferred stock shall be entitled to receive, when and as declared by the Board of Directors, from the surplus or net profits of the Company, and before any dividends are paid on the common stock of the company, fixed yearly dividends of six (6) per cent and in no event exceeding six (6) per cent, payable semi-annually, which shall be cumulative from and after the 1st day of January, 1916, but not before, and shall not otherwise participate in the profits of the Company.

2. All such dividends on Preferred Stock, and only such, as shall accrue from and after the 1st day of January, 1916, shall be cumulative, so that if for any period or periods beginning on or after said 1st day of January, 1916, the same be not paid, the right thereto shall accumulate as against the common stock, and all arrears of such cumulative dividends shall be paid before the payment of dividends can be commenced or resumed on the common stock.

3. The holders of preferred stock shall, in case of dissolution or liquidation of the company, be entitled to be paid in full, both the par amount of their shares and the accrued cumulative dividends unpaid thereon, before any amount shall be paid to the holders of common stock, and shall not thereafter participate in any of the property of the company or proceeds of liquidation. **[74]**

4. The holders of Preferred stock shall not be entitled to vote at any meeting of the stockholders,

and shall not be entitled to participate in the management of the Company.

B. The holders of Common stock shall have the right to vote at any and all meetings for the election of Directors, and at any and all meetings of stockholders concerning the management of the Company. This right shall be exercised solely and exclusively by the holders of the Common stock.

FIFTH: The amount of capital stock with which this company will commence business in the sum of Five Thousand (5,000) Dollars, being fifty (50) shares of Common stock of one hundred (100) dollars each, par value.

SIXTH: The names and places of residence of the subscribers and the number of shares subscribed for by each are as follows:

| Name. | Place of Residence. | Number of Shares. |
|---|---|---|
| Christian B. Zabriskie, | New York City, N. Y. | 44 |
| H. Ralph Ewart, | Wilmington, Delaware | 3 |
| Harry W. Davis, | Wilmington, Delaware | 3 |
| | | 50 |

SEVENTH: The period of existence of this company is unlimited and perpetual.

EIGHTH: The private property of the Stockholders of this Company shall not be subject to the payment of its corporate debts.

NINTH: In furtherance, and not in limitation of the powers conferred by statute, the Board of Directors of this Company are expressly authorized:

To make, alter, amend and rescind the By-Laws of this company, to fix the amount to be reserved as working capital, to authorize and cause to be exe-

cuted mortgages and liens upon the real and personal property of this company, subject to the limitations above set forth.

From time to time to determine whether and to what extent, and at what time and places and under what conditions and regulations, the accounts and books of this company (Other than the stock ledger), or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right of inspecting any account or book or document of this company except as conferred by statute or authorized by the Board of Directors or by a resolution of the majority of the stockholders.

If the By-Laws so provide, to designate two or more of their number to constitute an Execute Committee, which Committee shall for the time being, as provided in said resolution or in the By-laws of this Company, have and exercise any and all of the powers of the Board of Directors in the management of the business and affairs of this Company, and have power to authorize the seal of this company to be affixed to all papers which may require it.

Both stockholders and Board of Directors shall have power, if the By-laws so provide, to hold their meetings either within or without the State of Delaware, to have one or more offices in addition to the principal office in Delaware, and to keep the books of this company (subject to the provisions of the statute) outside of the State of Delaware at such places as may be from time to time designated by them.

This Company may in its By-Laws confer powers

additional to [75] the foregoing upon the Board of Directors, in addition to the powers and authorities expressly conferred upon them by the statute.

The Board of Directors shall have power to determine the use and disposition to be made of any surplus or net profits over and above the capital stock paid in, and may, in their discretion, and before any dividends are declared or become payable on any of the classes of stock to be issued hereunder, use, apply and set apart such surplus or net profits, in an amount to be determined upon, from time to time, by the Board of Directors in their discretion, as a reserve fund to most contingencies, or for equalizing dividends, or for additions and betterments, or for repairing or maintaining any property of the corporation, or for any such other purpose or purposes as the Board of Directors shall deem advisable or necessary to conserve the interests of the Company; and the Board may, in their discretion, use and apply such fund, or any part thereof, in purchasing or acquiring the bonds or other obligations or shares of capital stock of the corporation, to such extent and in such manner and upon such terms as the directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold unless such shares shall have been retired for the purpose of decreasing the corporation's capital stock as provided by law; and such reserve fund may in the discretion of the Board, be reserved and kept intact, or may be used and paid out, in their discretion, for any of the purposes aforesaid; but no stockholder shall ever acquire any

right to receive dividends out of such reserve fund, or the surplus or net profits set apart as aforesaid, except by resolution of the Board of Directors expressly adopted for that purpose, or upon the liquidation or insolvency of the Company.

In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the Board of Directors are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by this Company; subject, nevertheless, to the provisions of the statutes of Delaware, of this amended certificate, and to any By-laws from time to time made by the stockholders; provided, however, that no By-Laws so made shall invalidate any prior act of the Board of Directors which would have been valid if such By-Laws had not been made.

This company reserves the right to amend, alter, change or repeal any provision contained in this amended Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred on stockholders herein are granted subject to this reservation.

WE, THE UNDERSIGNED, being the incorporators of The United Properties Company of California, and the original subscribers of the capital stock hereinbefore named, for the purpose of forming a corporation to do business both within and without the State of Delaware, and in pursuance of an Act of the Legislature of the State of Delaware, entitled "An Act Providing a General Corporation Law," (approved March 10th, 1899), and the acts

amendatory thereof and supplemental thereto, and desiring to modify, change and alter its original certificate of incorporation, and no part of the capital of said corporation having been paid, do make and file this Amended Certificate, hereby declaring and certifying that no part of the capital of said Corporation has been paid, and that the facts herein stated are true, and do respectively agree to take the number of shares of stock herein [76] set forth, and accordingly have hereunto set our hands and seals, this 26th day of January, 1911.

CHRISTIAN B. ZABRISKIE. (Seal)
H. RALPH EWART. (Seal)
HARRY W. DAVIS. (Seal)

In the presence of
W. R. Alberger.

Clifford V. Mannering as to H. Ralph Ewart and Harry W. Davis.

State of California,
City and County of San Francisco,—ss.

BE IT REMEMBERED that on this 18th day of February, A. D. 1911, personally came before me, D. B. Richards, a Notary Public in and for the City and County of San Francisco, State of California, Christian B. Zabriskie, one of the parties to the foregoing Amended Certificate of Incorporation, known to me personally to be such, and acknowledged the said amended certificate to be his act and deed, and that the facts therein stated are truly set forth.

GIVEN under my hand and seal of office the day and year aforesaid.

D. B. RICHARDS,

Notary Public, in and for the City and County of San Francisco, State of California.

D. B. RICHARDS,

Notary Public, City and County of San Francisco.

Co. Clerk General Dept. F. No. 15.

State of California,

City and County of San Francisco,—ss.

I, H. I. MULCREVY, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court thereof, the same being a Court of Record, having by law a seal, do HEREBY CERTIFY, that D. B. RICHARDS, whose name is subscribed to the Certificate of the proof of acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof and acknowledgment, a Notary Public, in and for said City and County, residing therein, duly commissioned and sworn, and duly authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyance, for land, tenements or hereditaments in said State, to be recorded therein. And further that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said Certificate of proof or [77] acknowledgment is genuine, and that said instrument is executed and acknowledged according to the laws of said State.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, the 18th day of February, 1911.

H. I. MULCREVY,
Clerk.

Superior Court City and County of San Francisco, Cal.

State of Delaware,
County of New Castle,—ss.

BE IT REMEMBERED that on this twenty-third day of February, A. D. 1911, personally came before me, CLIFFORD V. MANNERING, a Notary Public for the State of Delaware, H. Ralph Ewart and Harry W. Davis, two of the parties to the foregoing Amended Certificate of Incorporation, known to me personally to be such, and severally acknowledged the said amended certificate to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

GIVEN under my hand and seal of office the day and year aforesaid.

CLIFFORD V. MANNERING,
Notary Public.

(Clifford V. Mannering, Notary Public, State of Delaware. Appointed Sept. 30, 1909. Term 4 years.)

STATE OF DELAWARE.
OFFICE OF SECRETARY OF STATE.

I, WILLIAM T. SMITHERS, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct

copy of the Amended Certificate of Incorporation of "THE UNITED PROPERTIES COMPANY OF CALIFORNIA," as received and filed in this office the twenty-fourth day of February, A. D. 1911, at 9 o'clock A. M.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, at Dover, this twenty-fourth day of February, in the year of our Lord one thousand nine hundred and eleven.

[Seal] WILLIAM T. SMITHERS,
Secretary of State.

Upon motion duly made and seconded, the meeting adjourned to meet on Saturday, February 25th, 1911, at 2:30 o'clock P. M.

(Seal) F. W. FROST,
Secretary." [78]

Mr. ERSKINE.—Q. Now, Mr. Tevis, did Mr. Hanford deliver to the United Properties Company within 30 days from February 24, 1911, the certificates of stock which he agrees to deliver in offer No. 1?

A. I believe that he did; I cannot say positively he did so within 30 days, but my impression is that he did; that is my best recollection.

Q. Were the certificates for bonds which were issued to him for the shares of stock which he delivered, issued to him before or after he delivered the shares of stock to it?

A. I cannot answer that question. It seems to me that the certificate book would be the best evidence of that. My impression is that the certificates were delivered after he delivered the stocks and bonds.

Q. Now, I call your attention to the fact that the original certificates were dated February 16, 1911, while this meeting was held on February 24, 1911. Now, isn't it a fact, Mr. Tevis, that while they were filled out and prepared on February 16, 1911, they were not delivered to him until after he made the delivery of stocks?

A. I believe that is correct. I would like to alter my testimony in one particular, with reference to the delivery of the stocks and bonds, that he was supposed to have made; there were certain stocks, preferred and common shares of stocks in the Traction Company that he agreed to deliver.

Q. Let me interrupt you for a moment. You are referring now to offer No. 2. I am only asking you about offer No. 1. A. Probably that is so. [79]

The WITNESS (Continuing).—The United Properties Company received and kept the shares of stock which Mr. Hanford delivered to it and I believe they still have them. The certificate book of the United Properties Company, which I have, is the first book kept by it. Certificates Nos. 45, 46, 47 and 48, shown me, I should say were certificates which were part of the certificates issued to Mr. Hanford in return for those stocks, and they were included in the 10,411 certificates for $1,000 a piece that were issued to him; that is my impression. I believe that number was issued to him.

The COURT.—Q. When you say that number, you are speaking now of the four you have just shown him, or of the 10,411?

Mr. ERSKINE.—The 10,411 for $1,000 each; that would make $10,411,000.

Mr. HENSHALL.—Will you direct Mr. Tevis' attention to the fact that you are dealing exclusively with offer No. 1?

Mr. ERSKINE.—Yes, I have not referred to offer No. 2 at all.

The WITNESS.—(Continuing.)

Interest was paid upon the certificates by the United Properties Company and the directors knew that the Company was paying that interest. When any certificates of the original issue were surrendered and new ones issued interest was paid on the new issue and the interest was paid to and including January, 1913. The books from which these certificates were issued and to which they were returned when they were surrendered were kept in the office of the Company, and [80] the directors knew they were kept there. I never heard of any resolution adopted by the directors of the United Properties Company disaffirming or disapproving of the issuance or reissuance of any of these certificates. I was a stockholder in the Company. I can identify one of the triplicate originals of the minutes of the stockholders meeting of the United Properties Company, and this book is a triplicate original of the minutes of the stockholders meeting of the Company.

Mr. ERSKINE.—Now, I offer in evidence the minutes of the stockholders meeting of The United Properties Company of California of December 5, 1911, and ask that they be considered as read.

Mr. HENSHALL.—I will admit that is a correct

stockholders meeting, subject to my previous objection that it is immaterial, irrelevant and incompetent.

The COURT.—I will take it subject to the objection.

The minutes of the stockholders meeting of The United Properties Company of California of December 5, 1911, were then read in evidence, and were and are in the words and figures, as follows: [81]

**Minutes of the Stockholders' Meeting of the United Properties Co. of California of December 5, 1911.**

"ADJOURNED ANNUAL MEETING OF STOCKHOLDERS OF THE UNITED PROPERTIES COMPANY OF CALIFORNIA.

San Francisco, California,

Tuesday, December 5th, 1911.

The adjourned Annual Meeting of the Stockholders of THE UNITED PROPERTIES COMPANY OF CALIFORNIA was held at the office of the Company, the same being located at room number 501, on the fifth floor of the building known as number 57 Post Street, in the City and County of San Francisco, State of California, on the fifth day of December, A. D. 1911, at the hour of two o'clock in the afternoon.

Mr. F. M. Smith called the meeting to order and, upon motion duly made and seconded, was elected Chairman.

Mr. F. W. Frost was appointed Secretary of the meeting.

The common stockholders' ledger of the Company, together with an alphabetical list of the common stockholders, was presented for the inspection of anyone entitled to see them.

The following stockholders were present in person at said meeting, holding the number of shares of the Common Capital Stock of said corporation herein set opposite their respective names to wit:

| | | |
|---|---|---|
| F. M. Smith, | 29,824.50 | shares |
| William S. Tevis | 47,597.50 | shares |
| The Realty Syndicate, represented by F. M. Smith, its President, | 77,075.50 | shares |
| Gavin McNab, | 10. | shares |
| Dennis Searles, | 1,038. | shares |
| W. R. Alberger, | 10. | shares |
| C. R. Alberger, | 3. | shares |
| F. W. Frost, | 7. | shares |
| Total number of shares | 155,565.50 | |

There were present at said meeting, by proxy, the following named stockholders of the corporation holding the number of shares of the common capital stock of said corporation herein set opposite their respective names, represented by Mr. William S. Tevis, who held the proxies in writing of said stockholders, to wit:

| NAMES. | SHARES. |
|---|---|
| Atwell, J. M. | 15. |
| Abrams, G. D. | 12.50 |
| Brooks, A. B. | 60. |
| Beal, C. N. | 13,202.70 |
| Bissell, W. A. | 262.50 |
| Beal, E. M. | 25. |
| Beal, Ray C. | 25. |
| Beal, Clyde N. | 25. |
| Bell, Traylor W. | 387. |
| Bell, Harmon | 1,814. |
| Barnard, W. C. | 2.50 |
| Bowes, John E. | 3.125 |
| Cartwright, F. W. | 1,207.90 |
| Davis, Harry W. | 13. |
| De Remer, J. G. | .50 |
| [82] | |
| Dodge, G. M. | 87.50 |
| Dixon, Rose K. | 175. |
| Dunne, Maud | 52.50 |
| Edwards, L. C. | 3.75 |
| Flint, Emma F. | 36. |
| Fletcher, H. K. | 15. |
| Fisher, James | 330.325 |
| Green, W. F. | 60. |
| Granger, J. T. | 350. |
| Gumpel, Max | 70. |
| Guittard, Frank | 23.30 |
| Getliffe, Fred | 2. |
| Gereneaux, Pauline K. | 13.125 |
| Greenbaum, Will L. | 6.50 |
| Hanford, R. G. | 314,035. |

| NAMES. | SHARES. |
|---|---|
| Harper, H. T. | 60. |
| Hanford, R. G. Tr. | 168,593.85 |
| Hanford Investment, | 4,542.41 |
| Kennedy, Robt. A. | 15. |
| Miller, W. S. | 936. |
| Meyberg, L. J. | 33.25 |
| Moore, Pierre C. | 50. |
| Martel, C. | 300. |
| Meredith, Wynn | 5. |
| McLaughlin, H. A. | 57. |
| Newmark, Leo | 26.25 |
| O'Connell, M., Trustee | 929.60 |
| O'Connell, M. | 50.50 |
| Rheem, W. S. | 1,188. |
| Robertson, C. H. | 30. |
| Scofield, D. C. | 1,071. |
| Scofield, Earle L. | 9. |
| Scofield, S. L. | 18. |
| Smith, J. P. | 15. |
| Sullivan, M. J. | 20.05 |
| Smith, Evelyn Ellis | 20,010. |
| Tevis, Wm. S., Tr. | 4.242 |
| Versalovich, V. P. | 58.375 |
| Versalovich, V. P., Tr. | 21. |
| Worden, Clinton E. | 4,021.75 |
| Wheeler, E. G. | 9,407.75 |
| Wilson, M. S. | 801.95 |
| Woodward, C. W. | 5. |
| Wilson, Fannie | 17.50 |
| Wells Fargo Nevada National Bank Pledgee | 1,500. |

| NAMES. | SHARES. |
|---|---|
| Western Metropolis National Bank, of San Francisco, Pledgee, | 480. |
| Warren, Chas. A. | 220. |
| Zabriskie, C. B. | 47. |
| Zeiss, Walter | 30. |
| Total number of shares | 546,890.202 |
| Total number of shares present,— | 702,455.702 |
| Total number of shares absent,— | 4,925.240 |
| Total number of shares issued,— | 707,380.942 |

[83]

Thereupon, the Chairman submitted the question of the validity of said proxies to the meeting and the same was duly declared and found to be sufficient in all respects to confer the requisite authority upon the holder thereof.

The proxies presented were ordered to be filed with the Secretary of the meeting.

The Secretary presented and read a copy of the notice calling the Annual Meeting and the same was ordered filed with the Secretary of the meeting.

The Chairman then stated that as said notice of meeting had been properly given, and as more than a majority of the Common Capital Stock was represented, the meeting was competent to proceed with the transaction of business.

Upon motion duly made, seconded and unanimously carried, the reading of the minutes of the last meeting of the Stockholders was waived.

Upon motion duly made, seconded and unani-

mously carried, the meeting proceeded to the election of a Board of eight Directors to hold office for the ensuing year and until others are elected and qualified in their stead.

Messrs. W. R. Alberger and Dennis Searles were appointed Inspectors of Election and the oath was duly administered to them.

Said oath is as follows:

INSPECTORS' OATH.

State of California,
County of San Francisco,—ss.

W. R. ALBERGER and DENNIS SEARLES being sworn upon their respective oaths do severally promise and swear that they will faithfully, honestly and impartially perform the duties of inspector of election, and will to the best of their skill and ability conduct the election to be held this day for directors of the above-named corporation and a true report make of the same.

(Signed) W. R. ALBERGER,
(Seal) DENNIS SEARLES.

Subscribed and sworn to before me this 5th day of December, 1911.

(Signed) MARY L. THOMAS,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires June 20, 1915.

The polls were thereupon opened and remained open one-quarter of an hour.

The stockholders prepared their ballots and delivered them to the Inspectors.

The polls thereupon being closed, the Inspectors presented their report showing that the following persons, stockholders of the corporation, had received 702,455,702 votes, representing 702,455,702 shares:— [84]

| Name. | Number of Votes. |
|---|---|
| F. M. Smith | 702,455,702 |
| William S. Tevis | 702,455,702 |
| R. G. Hanford | 702,455,702 |
| Gavin McNab | 702,455,702 |
| C. B. Zabriskie | 702,455,702 |
| W. R. Alberger | 702,455,702 |
| Dennis Searles | 702,455,702 |
| H. W. Davis | 702,455,702 |

Said Inspectors' Certificate is as follows

INSPECTORS' CERTIFICATE.

WE, THE INSPECTORS OF ELECTION, appointed to act at the meeting of the stockholders of the above-named corporation held this fifth day of December, 1911, do report that, having taken an oath impartially to conduct the election, we did receive the votes of the stockholders by ballot.

We report that the votes were cast, and that the following persons received the number of votes set opposite their respective names, to wit:

| For Directors. | Number of Votes. |
|---|---|
| F. M. Smith | 702,455,702 |
| William S. Tevis | 702,455,702 |
| R. G. Hanford | 702,455,702 |
| Gavin McNab | 702,455,702 |
| C. B. Zabriskie | 702,455,702 |
| W. R. Alberger | 702,455,702 |

| For Directors. | Number of Votes. |
|---|---|
| Dennis Searles | 702,455,702 |
| H. W. Davis | 702,455,702 |

All of which is respectfully submitted this fifth day of December, A. D. 1911, at San Francisco, California.

(Signed) W. R. ALBERGER,
DENNIS SEARLES,
Inspectors.

The Chairman thereupon declared the above-named persons elected Directors of the Company, to hold office until the next annual election and until their successors are elected and qualified.

Upon motion duly made, seconded and unanimously carried, said Stockholders then adopted the following resolution:

RESOLVED, That all the acts, contracts and proceedings of the officers, directors and committees of this corporation since the first meeting of the Incorporators of this corporation, which meeting was held in the City of Wilmington, State of Delaware, on the thirty-first day of December, 1910, to this date, be and they are, hereby in all respects ratified, confirmed and approved and declared to be the acts and deeds of this corporation.

There being no further business before the meeting it was, upon motion duly made and seconded, declared adjourned.

(Seal)

F. M. SMITH,
Chairman of Meeting.

F. W. FROST,
Secretary of Meeting." [85]

The WITNESS.—(Continuing.) I believe I was present at the meeting at which the resolution was passed and which has just been read. I have held proxies for 546,890 shares, out of the 700,000 that were present; that is, if the resolution so states, I undoubtedly did so, because I know it is correct. At the time the resolution was passed, December 5, 1911, I knew and to the best of my knowledge all the other persons knew that these certificates had been issued.

Mr. ERSKINE.—There has been an admission of facts filed in this case and in the case of Kibbe vs. United Properties Company, and there is a stipulation on file in the other two cases, adopting this admission of facts as an admission of facts in those actions. Now, I will offer the admissions of facts in evidence as part of my case. I also offer in evidence the stipulation on file in the two Burkhardt cases adopting this admission of facts as an admission of facts in those two cases.

The admission of facts and stipulations, referred to, were then read in evidence, and were and are in the words and figures following, to wit: [86]

(Title of Court and Cause.)

"ADMISSION OF CERTAIN FACTS.

Whereas the above-entitled action is at issue and ready for trial,

Now, therefore, the following facts and matters are admitted:

On the 31st day of December, 1910, the articles of incorporation of the defendant were filed in the office of the secretary of state of the State of Delaware

and a certificate of incorporation was thereupon issued.

The names of the Incorporators are:

Christian B. Zabriskie,
Ralph Ewart,
Harry W. Davis.

Thereafter the first meeting of the corporation was held on the 31st day of December, 1910, at the office of the Delaware Trust Company in the City of Wilmington, State of Delaware:

C. B. Zabriskie owning 44 shares of the common capital stock of the defendant;

Ralph Ewart owning 3 shares of the common capital stock of the defendant, and

Harry W. Davis owning 3 shares of the common capital stock of the defendant.

The incorporators of the said defendant were present. The By-laws were duly and properly adopted at the said meeting. A copy of the provisions of these by-laws which deal with:

1. The election of directors,
2. The powers of the board of directors,
3. The creation and powers of an executive committee of the board of directors,
4. The powers of the president of the corporation and chairman of the executive committee during the intervals between the meetings of the latter,
5. The powers of the vice-president, secretary, assistant secretaries and treasurer,
6. The time, place and manner of the holding of stockholders' meetings, and

7. The filling of vacancies caused by the absence of directors, [87]
are set forth in "Exhibit A" which is hereto annexed, hereby referred to and made a part hereof for all purposes.

Thereafter at the said meeting subscriptions for common capital stock of the said defendant were read. The names of the subscribers with the amounts subscribed by each, respectively set after their names, are as follows:

F. M. Smith, 10 shares,
W. S. Tevis, 10 shares,
R. G. Hanford, 10 shares,
Gavin McNab, 10 shares,
C. B. Zabriskie, 10 shares,
W. R. Alberger, 10 shares, and
Dennis Searles, 10 shares.

Thereupon an election of directors was held and the following persons were elected directors of the corporation to serve until the annual meeting of stockholders on the 25th day of October, 1911. The said directors so elected were:

F. M. Smith,
W. S. Tevis,
R. G. Hanford,
Gavin McNab,
C. B. Zabriskie,
W. R. Alberger,
Dennis Searles, and
Harry W. Davis.

The Board of Directors was then duly and properly authorized to issue the capital stock of the de-

fendant company in such amounts and proportions as from time to time they should determine in full or partial payment for cash, property, contracts, rights, services and labor.

Thereafter the meeting adjourned.

By the articles of incorporation the corporation is given the power to purchase and acquire the capital stock of other corporations. This is designated in the articles as one of the purposes of incorporation.

The capital stock of the defendant consists of 2,000,000 shares [88] of the par value of $100.00 a share divided into the following classes:

1. Preferred .....500,000 shares
2. Convertible .....750,000 shares
3. Common .....750,000 shares

The articles provide that the holders of preferred and convertible stock shall not be entitled to a vote and shall not be entitled to participate in the affairs of the corporation; that the right to vote at any meeting of the stockholders shall be exercised solely and exclusively by the majority holders of the common stock.

On January 13th, 1911, in San Francisco, California, the first meeting of directors was held. The following officers were elected:

F. M. Smith, President,
W. S. Tevis, First Vice-president,
W. R. Alberger, Second Vice-president,
C. B. Zabriskie, Treasurer,
Gavin McNab, Chief Counsel.

The following executive committee was appointed:

F. M. Smith,

Gavin McNab,

C. B. Zabriskie.

The meeting was then adjourned until February 24th, 1911. On February 24th, 1911, the adjourned meeting was held. All of the directors were present with the exception of Harry W. Davis.

On February 16th, 1911, certificate No. 45, similar in form, tenor, covenants and provisions to said Exhibit A of complaint, but calling for five hundred bonds of the par value of Five Hundred Thousand ($500,000.00) Dollars, was subscribed by W. R. Alberger, vice-president, and by C. B. Zabriskie, Treasurer, the seal of the corporation was affixed and the name of R. G. Hanford was written into said certificate in the place where the names of Ira M. Condit and Mary Ellen Kibby appear on said Exhibit A. This [89] certificate was delivered to said R. G. Hanford subsequent to February 24th, 1911.

On February 16th, 1911, certificate No. 47, similar in form, tenor, covenants and provisions to said Exhibit A, but calling for two hundred (200) bonds of the par value of Two Hundred Thousand ($200,000) Dollars, was subscribed by W. R. Alberger, vice-president and by C. B. Zabriskie, treasurer, the seal of the corporation was affixed, the name of R. G. Hanford was written into said certificate in the place where the names of Ira M. Condit and Mary Ellen Kibby appear on the said Exhibit A. This certificate was delivered to said R. G. Hanford subsequent to February 24th, 1911.

On the 16th day of February, 1911, certificate No. 48, similar in form, tenor, covenants and provisions to said Exhibit A, but calling for two hundred (200) bonds of the par value of two hundred thousand ($200,000) Dollars, was subscribed by W. R. Alberger, vice-president and by C. B. Zabriskie, treasurer, the seal of the corporation was affixed and the name of R. G. Hanford was written into said certificate in the place where the names of Ira M. Condit and Mary Ellen Kibby appear on the said Exhibit A. This certificate was delivered to said R. G. Hanford subsequent to February 24th, 1911.

That on or about March 11th, 1911, certificate Number forty-five (45) was surrendered by the said R. G. Hanford to the United Properties Company and in lieu of part thereof certificates numbered 73 for ten bonds, 74 for ten bonds, 75 for ten bonds, 78 for five bonds and 79 for five bonds, were signed by the officers of the corporation who signed certificate No. 45 or by officers duly appointed in the place thereof and the seal of the corporation was affixed to each of the said certificates [90] numbered 73, 74, 75, 78 and 79; and each of them was issued to R. G. Hanford by the officers signing the same; each of said last-mentioned certificates was similar in form, tenor, provisions and covenants to Certificate No. 45.

That on or about June 27th, 1911, certificate No. 47 was surrendered by R. G. Hanford to the United Properties Company and in lieu thereof certificates numbered 497 for 100 bonds, and 498 for 100 bonds were signed by the officers of the corporation who

signed certificate No. 47 or officers duly appointed in the place thereof and the seal of the corporation was affixed to each of the said certificates numbered 497 and 498 and each of them was issued by said officers to said Hanford Investment Company; each of said last-mentioned certificates was similar in form, tenor, provisions and covenants to Certificate No. 47.

That on or about March 11th, 1911, Certificate No. 48 was surrendered by the said R. G. Hanford to the United Properties Company and in lieu of part thereof certificates numbered 86 for 5 bonds, 96 for 10 bonds, 98 for 10 bonds and 99 for 10 bonds were signed by the officers of the corporation, who signed certificate No. 48, or by officers duly appointed in the place thereof and the seal of the corporation was affixed to each of the said certificates numbered 86, 96, 98 and 99; and each of them was issued by said officers to said R. G. Hanford, each of said last-mentioned certificates was similar in form, tenor, provisions and covenants to Exhibit A and to Certificate No. 48.

That on or about September 28, 1911, the aforesaid certificates numbered 73, 74, 75, 78, 79, 86, 96, 98, 99 and 497, respectively, were surrendered by R. G. Hanford and the Hanford Investment Company to the United Properties Company and in lieu of part of said last-mentioned certificates a new certificate, [91] numbered 528 for 175 bonds, similar in form, tenor, provisions and covenants to said certificates numbered 45, 47 and 48, was signed by the officers of the United Properties Company signing certificates 45, 47, and 48, or by officers duly appointed

in the place thereof, and with the seal of the corporation affixed, was issued by said officers to R. G. Hanford.

That thereafter on or about September 28th, 1911, said R. G. Hanford surrendered to the United Properties Company the said certificate No. 528 and in lieu of part thereof, at said R. G. Hanford's request, a new certificate No. 529 for thirty-seven bonds similar in form, tenor, provisions and covenants to certificates numbered 45, 47 and 48, was signed by the said officers duly appointed in the place of the officers signing said last-mentioned certificates, and with the seal of the corporation affixed thereto, the said certificate No. 529 was issued by the said officers to R. B. Mott.

That on or about the 28th day of November, 1911, the said R. B. Mott surrendered to the said United Properties Company the said certificate No. 529 and in lieu of part thereof a certificate numbered 562 for one bond, similar in form, tenor, provisions and covenants to certificates numbered 45, 47 and 48, signed by the officers signing certificates numbered 45, 47 and 48 or officers duly appointed in the place thereof, was issued by said officers to said R. B. Mott.

That thereafter on or about the 15th day of February, 1912, said R. B. Mott transferred, assigned and set over to Ira M. Condit and Mary Ellen Kibbe as joint owners or to the survivor of them the said certificate No. 562.

That on or about the 28th day of November, 1911, the Hanford Investment Company surrendered to the United Properties Company [92] certificate

No. 549 and in lieu of part thereof, certificate No. 553 for twenty-five bonds, similar in form, tenor, provisions and covenants to Certificate No. 549 and signed by the officers signing Certificate No. 549 or officers duly appointed in the place thereof and having the seal of the United Properties Company affixed thereto was issued by said officers to Leo R. Dickie; that said Leo R. Dickie paid the said William Hammond, Jr., for said Certificate No. 553 a good, sufficient and valuable consideration.

That thereafter on January 5th, 1912, the said Leo R. Dickie surrendered to the United Properties Company Certificate number five hundred and fifty-three (553) and in lieu of part thereof, certificate number six hundred and sixteen (616) for twelve (12) bonds, similar in form, tenor, provisions and covenants to Certificate number five hundred and fifty-three (553) and signed by the officers signing certificate number five hundred and fifty-three (553) or officers duly appointed in the place thereof and having the seal of the United Properties Company affixed thereto was issued by said officers to R. B. Mott; that said R. B. Mott paid the said Leo R. Dickie for said certificate number six hundred and sixteen (616) a good, sufficient and valuable consideration.

That thereafter the said R. B. Mott transferred, assigned and set over to Ira M. Condit and Mary Ellen Kibbe as joint owners or to the survivor of them the said certificate number six hundred and sixteen (616).

That on or about February 15th, 1912, said Con-

dit and said Kibbe surrendered to the said United Properties Company certificates numbered six hundred and sixteen and five hundred and sixty-two (562) and in lieu thereof a new certificate numbered six hundred and sixty (660), a copy of which is set out in full [93] by the plaintiff in her complaint on file herein, was signed by the officers signing bond certificate number forty-seven (47) or officers duly appointed in the place thereof, the seal of the corporation was affixed and the said certificate was issued to said Ira M. Condit and Mary Ellen Kibbe as joint owners or to the survivors of them.

Interest was paid on the indebtedness evidenced by that part of certificates numbered 45, 47 and 48 which became merged by virtue of the surrender and re-issuance above referred to into certificate No. 660 for thirteen bonds of the par value of $1000 each, which certificate is the one sued on in the above-entitled action. This interest was paid in semi-annual installments at the rate of five per cent per annum for the following periods:

from January 1st, 1911, to July 1st, 1911,
from July 1st, 1911, to January 1st, 1912,
from January 1st, 1912, to July 1st, 1912, and
from July 1st, 1912, to January 1st, 1913.

The said Kibbe and Condit received the installments of interest paid for the period from January 1st, 1912, to July 1st, 1912, from July 1st, 1912, to January 1st, 1913. Part of the first installment of interest was paid on July 1st, 1911, the balance thereof on November 18th, 1911, the second installment on the 2d of January, 1912, the third installment on

July 6th, 1912, and the fourth installment on January 9th, 1913.

During the time that each of the certificates hereinbefore referred to were issued there was kept in the office of the United Properties Company a certificate book containing documents numbered from 1 to 1500 inclusive, of the same form, tenor and containing the same provisions, terms and covenants contained in the certificate sued on, except that the name of the holder, the amount thereof and the date thereof were left blank and there were no signatures thereon and the seal of the corporation was not [94] affixed thereto. Attached to each of these certificates was a stub, When a certificate was issued, the name of the holder, the number of the certificate, the amount thereof and the date of issuance was written on the stub and then the certificate was detached from the stub and given to the holder after having been signed by the officers of the corporation and after having the seal affixed. When a certificate so issued was surrendered it was again affixed to its proper stub and the officers receiving the same noted on the stub that the certificate had been returned and the number of the certificate or certificates which were issued in lieu thereof. Certificates from number 1 to 1500 for various numbers of bonds and in various amounts were issued, surrendered and reissued.

These transactions took place during the years 1911, 1912 and 1913. All of the directors knew that these transactions were taking place; all of the directors had at various times received certain of

these certificates. The said directors at all times during the last mentioned period held a majority in number of the shares of the capital stock issued by the said corporation.

On or about September 1st, 1911 F. M. Smith and W. S. Tevis and R. G. Hanford entered into an agreement in writing, a copy of which is hereto annexed, marked Exhibit D and is hereby referred to and made a part hereof for all purposes.

On the 25th day of April, 1915 the said Ira M. Condit died in the County of Alameda, State of California; the plaintiff, Mary Ellen Kibbe is the sole owner and holder of the certificate sued upon and is the same person as the Mary Ellen Kibby mentioned in the said certificate; she is the daughter of the said Ira M. Condit.

The laws and statutes of the State of Delaware during the [95] period from January, 1910 to date in reference to corporations are hereby referred to and made a part hereof for all purposes just as if the said laws and statutes had been offered and admitted in evidence at the trial of this action. There has been no law or statute during the last mentioned period in the State of Delaware requiring a corporation before creating or increasing any bonded indebtedness to comply with any proceedings or requirements similar or in substance or effect alike to those set forth in Section 359 of the Civil Code of the State of California. There has never been any laws or statute of the State of Delaware requiring a two-thirds vote of the stockholders or the written assent of 2/3 of the stockholders in order to create

or increase a bonded indebtedness of a corporation.

It is stipulated that the foregoing statements of facts are admitted subject to any objection that either party may have thereto on the ground that the evidence of any of the said facts is incompetent, irrelevant or immaterial.

It is further stipulated that upon the trial of the action, either of the parties thereto, may introduce such other and further evidence supplementing the statement of facts contained in the foregoing which they may care to present subject, however, to any objection that such other and further evidence is incompetent, irrelevant and immaterial, and provided that if either party intends to introduce such other and further evidence, he shall notify the other party of his intention to introduce such other and further evidence at least five days before the date set for the trial of the said action.

Dated: June 24th, 1918.

HERBERT W. ERSKINE,
Attorney for Plaintiff.
R. P. HENSHALL,
Attorney for Defendant. **[96]**

**Exhibit "A" to Admission of Certain Facts.**

No. 4. The property and business of the company shall be managed and controlled by a Board of eight directors, who shall at all times be stockholders, and at least one of whom shall be an actual resident of Delaware.

They shall hold office until the next annual meeting of the stockholders or until others are elected

and qualified in their place and stead.

The number of directors may at any time be increased by an affirmative vote of a majority of the entire Board of Directors, at a special meeting called for that purpose, and in case of any such increase, the Board of Directors, shall have power to elect such additional directors to hold office until the next meeting of stockholders, and until the successors of such additional directors so elected, are elected and qualified.

If the office of any Director becomes vacant, by reason of death, resignation or disqualification, the remaining directors, by a majority vote, may elect a successor, who shall hold office for the unexpired term and until his successor is elected.

POWERS OF THE DIRECTORS.

No. 5. The Board of Directors shall have general management of the business of the Company, shall exercise the powers necessary to accomplish the purposes and object for which it is organized, as specified in its certificate of incorporation, and in addition to the powers and authorities by these By-laws expressly conferred upon them, may exercise all such powers and do all such acts and things, as may be exercised or done by the company, but subject, nevertheless, to the provisions of the statute, of the charter and of these By-laws, and to any regulation from time to time made by the stockholders, provided that no regulation so made shall invalidate any prior act of the Board of Directors which would have been valid if such regulation had not been made.

Without prejudice to the general powers con-

ferred by the last preceding clause the powers conferred by the certificate of incorporation, and the other powers conferred by these By-laws, it is hereby expressly declared that the Board of Directors shall have the foregoing powers, that is to say:

To purchase or otherwise acquire, for the Company any property, rights, or privileges which the company is authorized to acquire, at such prices and on such terms and conditions, and for such consideration as they may see fit.

At their discretion to pay for any property or rights acquired by the Company either wholly or partially in money or in stock, bonds, debentures or other securities of the company.

To appoint, and at their discretion to remove or suspend subordinate managers, officers, assistants, clerks, agents and servants, permanently or temporarily, and to determine their duties and fix, and from time to time change, their salaries or emoluments, and to require security in such instances and in such amounts as they think fit.

To confer by resolution, upon any officer of the Company the right to choose, appoint, remove or suspend such subordinate officers, agents or factors, and to determine their duties and fix and from time to time change their salaries and emoluments.

To appoint any person or persons to accept and hold in [97] trust for the Company any property belonging to the Company, or in which it has an interest, or for any other purpose, and to execute and do all such duties and things as may be requisite in relation to any such trust.

To create, make and issue mortgages, bonds, deeds of trust, trust agreements and negotiable or transferable instruments and securities, secured by mortgage or otherwise, and to do other acts and things necessary to effectuate the same.

To determine who shall be authorized to sign on the Company's behalf, bills, notes, receipts, acceptances, endorsements, checks, releases, contracts and documents.

From time to time to provide for the management of the affairs of the Company at home or abroad in such manner as they think fit, and in particular, from time to time to delegate any of the powers of the Board of Directors to any committee, officer, or agent, and to appoint any persons to be the agents of the company with such powers (including the power to subdelegate) and upon such terms as may be determined.

MEETINGS OF THE STOCKHOLDERS.

No. 6. Meetings of the stockholders shall be held at the office of the Company in the City of San Francisco, State of California, or the City of Wilmington, State of Delaware, as may be determined by the Board of Directors.

Holders of common stock may vote at all meetings either in person or by proxy in writing. All proxies shall be filed with the secretary of the meeting before being voted upon.

A majority in amount of Common Stock issued and outstanding, represented by the holders in person or by proxy, shall be requisite at all meetings to con-

stitute a quorum for an election of Directors or the transaction of any other business.

The annual meeting of the stockholders shall be held on the 25th day of October at two o'clock, in the afternoon in each year, beginning in the year nineteen hundred and eleven, if not a legal holiday, and, if a legal holiday, then on the day following, when they shall elect, by a plurality vote, by ballot, a board of eight (8) directors to serve for one year, and until their successors are elected or chosen and qualified, each holder of common stock being entitled to one vote for each share of common stock standing registered in his or her name on the twentieth day preceding the election, exclusive of the day of such election.

MEETINGS OF DIRECTORS.

No. 7. The newly elected directors shall meet as soon as possible after their election, at the office of the Company, in the City of San Francisco, State of California, for the purpose of organization and otherwise, and no notice of such meeting, provided a majority of the whole board shall be present shall be necessary to the newly elected directors in order to legally constitute the meeting.

At the first meeting after their election the directors shall elect from among their number, a President, a First Vice-president and three other Vice-presidents, and shall also elect a treasurer, to hold office for one year and until others are [98] elected and qualified. A secretary shall be elected or appointed who may or may not be a director, and

whose term of service shall be subject to the pleasure of the Board of Directors.

Regular meetings of the Board of Directors may be held without notice at such time and place as may be determined, from time to time by resolution of the Board.

Notice of regular meetings may be mailed to each Director at his last known post office address by the secretary at least five days previously.

Five directors shall be necessary at all meetings to constitute a quorum for the transactions of business.

Special meetings of the Board may be called by the President on one day's notice to each Director, either personally or by wire; special meetings may be called in like manner on the request in writing of four directors.

STANDING COMMITTEES.

No. 8. The Board of Directors may appoint from their number, standing committees and may invest them with all their own powers subject to such conditions as they may prescribe, and all committees so appointed shall keep regular minutes of their transactions and shall cause them to be recorded in books kept for that purpose in the office of the Company, and shall report the same to the Board of Directors at their next regular meeting.

OFFICERS OF THE COMPANY.

No. 9. The officers of the Company shall consist of a President, a first Vice-president, and three other Vice-presidents Secretary, Treasurer, and

such other subordinate officers as may from time to time be elected or appointed by the Board of Directors.

One person may hold the office of Secretary and Treasurer, and if deemed advisable by the Board of Directors, a Vice-president may hold the offices of Vice-president, Treasurer, or a Vice-president and Secretary, but not the offices of Vice-president, Secretary and Treasurer.

OFFICERS HOW CHOSEN.

No. 10. At the first meeting after their election the Directors shall elect annually from among their own number a president and a first Vice-president, and three other Vice-presidents, and a treasurer, to hold office for one year and until their successors are elected and qualified. They shall not be subject to removal during their respective terms of office except for cause, nor shall their term of office be diminished during their tenure. The Board of Directors shall also appoint or elect a secretary whose term of office shall be subject to the pleasure of the Board.

DUTIES OF THE PRESIDENT.

No. 11. The president shall be the chief executive officer of the company; he shall preside at all meetings of the directors, he shall have general and active management of the business of the company; he shall see that all orders and resolutions of the Board of Directors are carried into effect; he shall execute all [99] contracts and agreements authorized by the Board of Directors; shall keep in safe custody the seal of the Company, and, when authorized by

the Board of Directors to affix the seal to any instrument requiring the same, and the seal when so affixed shall be attested by the signature of the Secretary.

He shall sign all certificates of stock.

He shall have general supervision and direction of all the other officers of the company, and shall see that their duties are properly performed.

He shall submit a report of the operations of the company for the fiscal year to the Board of Directors at their first regular meeting in each year, and to the stock holders at their annual meeting, and from time to time shall report to the Board of Directors all matters within his knowledge which the interests of the Company may require to be brought to its notice.

He shall be ex-officio a member of all standing committees and shall have the general powers and duties of supervision and management usually vested in the office of the president of a corporation.

VICE-PRESIDENT.

No. 12. The First Vice-president shall be vested with all the powers and authority, and shall perform all the duties and exercise all the functions of the president in his absence from the principal place of business, to wit: the State of California, or in case of the inability of the President, for any reason, to act; and in the event of absence or inability for any reason, of both the President and First Vice-president, all the powers, duties, authority and functions of the President shall devolve upon one of the other Vice-presidents, who shall be designated by the first Vice-president, and in the event of the absence from the

State of California or the inability for any reason of the Vice-president thus selected to act, he shall in like manner designate a Vice-president to act as President.

SECRETARY.

No. 13. The Secretary shall attend all sessions of the Board of Directors and act as Clerk thereof and record all votes and the minutes of all proceedings in a book to be kept for that purpose; and shall perform all duties for the Standing Committees when required.

He shall see that proper notice is given of all meetings of the holders of Common Stock of the Company, and of the Board of Directors, and shall perform such other duties as may be prescribed from time to time by the Board of Directors or the President. He shall be sworn to the faithful discharge of his duty.

TREASURER.

No. 14. The Treasurer shall keep full and accurate accounts of receipts and disbursements in books belonging to the corporation and shall deposit all money and other valuable effects in the name and to the credit of the company, in such depositaries as may be designated by the Board of Directors.

He shall disburse the funds of the Company as may be ordered by the Board of Directors, or the President, taking proper [100] vouchers for such disbursements, and shall render to the President and Directors at the regular meetings of the Board of Directors, or whenever they may require it, an account of all his transactions as Treasurer and of

the financial condition of the company.

If required by the Board of Directors, he shall give the Company a Bond in form and in a sum with security satisfactory to the Board of Directors, for the faithful performance of the duties of his office, and the restoration to the Company in case of his death, resignation or removal from office, of all books, papers, vouchers, money and other property of whatever kind in his possession belonging to the company. He shall perform such other duties as the Board of Directors may from time to time prescribe or require.

Certificates of stock when signed by the President shall be countersigned by the Treasurer. He shall keep the accounts of the stock registered and transferred in such form and manner and under such regulations as the Board of Directors may prescribe.

DUTIES OF OFFICERS MAY BE DELEGATED.

No. 16. In case of the absence of any officer of the company the Board of Directors may delegate the powers or duties of such officer to any other officer or to any Director for the time being.

EXECUTIVE COMMITTEE.

No. 25. The Board of Directors may appoint annually an Executive Committee of three persons from their own number.

The executive committee shall not have authority to alter or amend the By-laws, but shall exercise all other powers of the Board of Directors between the meetings of said Board.

The executive committee shall appoint a Secre-

tary, who shall keep regular minutes of the actions of said committee, and report the same to the Board of Directors and the Board shall adopt such report as a part of its proceedings.

The Board of Directors may designate for such Committee, a Chairman, who shall continue to be Chairman of the Committee during the pleasure of the Board.

The Board of Directors shall fill vacancies in the Executive Committee by election from the Directors, and at all times it shall be the duty of the Board of Directors to keep the membership of such committee full, with due regard to the qualifications necessary for such membership.

All action by the Executive Committee shall be reported to the Board of Directors at its meeting next succeeding such action.

The Executive Committee shall fix its own rules of procedure, and shall meet where and as provided by such rules, or by resolution of the Board of Directors, but in every case, the presence of at least two members shall be necessary to constitute a quorum.

In every case the affirmative vote of a majority of all the members of the Executive Committee present at the meeting shall be necessary to the adoption of any resolution.

The powers of this Executive Committee, during intervals between meetings of the Board of Directors shall extend to the purchase of property and the execution of legal instruments with or without the corporate seal, in such manner as such Committee shall deem to be for the best interests of the Com-

pany, in all case in which specific directions have not been given by the Board of Directors. **[101]**

During the intervals between the meetings of the Executive Committee, and subject of its review, the President of the Board of Directors and the Chairman of the Executive Committee together, shall possess and may exercise any of the powers of the Committee, except as from time to time shall be otherwise provided by resolution of the Board of Directors.

CONTRACTS.

No. 29. The Board of Directors in its discretion may submit any contract of act for approval or ratification at any annual meeting of the holders of Common stock, or at any meeting of such stockholders called for the purpose of considering any such act or contract; and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the Common Stock of the Company which is present in person or by proxy at such meeting (provided that a lawful quorum of holders of Common stock be there represented in person or by proxy) shall be as valid as binding upon the company and upon all the stockholders as though it has been approved or ratified by every stockholder of the company.

**Exhibit "D" to Admission of Facts.**

Agreement made this —— day of September, 1911, between F. M. Smith of the City of Oakland, County of Alameda, State of California, W. S. Tevis of the City of Bakersfield, County of Kern and State

aforesaid, and R. G. Hanford of the City and County of San Francisco, State of California.

WITNESSETH:

That whereas said F. M. Smith did on or about the 25th day of October, 1910 enter into an agreement with said W. S. Tevis and said R. G. Hanford by the terms whereof said F. M. Smith did among other things agree to deliver to said R. G. Hanford or to the United Properties Company of California, a corporation, as his nominee not less than 75% of the total issued shares of the Oakland Terminal and San Francisco, Oakland, and San Jose Consolidated Railways and of each of them,

And whereas the total issued shares of said Company are as follows:

Oakland Traction Company,

108,750 shares of common; 70,500 shares of preferred. **[102]**

San Francisco, Oakland and San Jose Consolidated Railways,

27,500 shares of common

50,000 shares of preferred.

And whereas the amount of stocks to be delivered under said agreement by said F. M. Smith were as follows:

Oakland Traction Company,

97,437.3 shares of common

37,000.3 shares of preferred.

San Francisco, Oakland and San Jose Consolidated Railways,

26,078.5 shares of common and

32,050 shares of preferred.

And whereas on the 18th day of August, 1911 deliveries had been made as follows:

Oakland Traction,

94,801 shares of common;

18,337 shares of preferred.

San Francisco and San Jose Consolidated Railways,

27,300 shares of common;

19,775 shares of preferred.

And whereas, certain extensions have from time to time been granted to said Smith, and he is desirous of further extension of time, in consideration of the premises and of other good and sufficient considerations, Tevis and Hanford hereby extend the time for delivery of the shares of stock remaining to be delivered by F. N. Smith until the first day of September 1912, and the said Smith hereby agrees that he will, on or before said date, make delivery of a sufficient number of shares of the capital stock of said Traction Co. and said San Francisco, Oakland and San Jose Consolidated Railway to make, together with those already delivered, not less than 66 2/3% of the total issued stock of each of said companies, and as soon as possible thereafter, and in no event later than the first day of March, 1913, to deliver the entire balance remaining to be delivered by him, that is to say, sufficient to make 75% of the total issued stock of each of said companies, as hereinabove set forth and that he will at the time of such deliveries accept therefor the securities exchangeable therefor under said agreement hereinabove referred to between said F. M. Smith, W. S. Tevis and R. G. Hanford.

IN WITNESS WHEREOF, the parties hereto have hereunto signed their names the day and year first above written.

(Signed) F. M. SMITH,
W. S. TEVIS.
R. G. HANFORD." **[103]**

**Stipulation Re Admission of Facts, etc.**

(Title of Court and Cause.)

"STIPULATION.

Whereas the above-entitled action is at issue and ready for trial.

Now, Therefore, the facts set forth in the admission of facts filed in the action of Kibbe vs. United Properties Company, pending in the above entitled court and bearing No. 15967½ are hereby admitted subject to the same conditions and stipulations contained in said admission of facts with the following exceptions, which are hereby admitted, to wit:

1. The above entitled action is commenced not by the person to whom the certificates referred to in the complaint on file herein were issued, but by the assignee of the person who procured the certificates issued to him for a good, valuable and sufficient consideration.

2. Each of the certificates sued upon in the above entitled action came to the assignor of the plaintiff through the same process that Certificate No. 660, held by the plaintiff, Mary Ellen Kibbe, in the said action of Kibbe vs. United Properties Company came to her from Certificates numbered 45, 47 and 48. The original certificates in place of which or in

place of a portion of which each of the certificates sued on in the above entitled action was issued, were delivered to R. G. Hanford or to his nominee in the same manner and at the same time that certificates numbered 45, 47 and 48 referred to in the statement of facts in the case of Kibbe vs. United Properties Company were delivered to him.

3. Each of the certificates referred to in the complaint in the above-entitled action was assigned to the plaintiff therein by the holder thereof on the respective dates upon which it is **[104]** alleged in the complaint each certificate was assigned to this plaintiff.

4. At the time each of the assignments was made all the right, title and interest of the holder of the certificate so assigned in and to the said certificate and in and to any cause of action, claim or demand against the said United Properties Company, its stockholders or directors or officers, arising out of or by virtue of said certificate was assigned to the plaintiff in the above-entitled action, and the said plaintiff ever since has been and is now the owner and holder of said certificate and of said claim, demand and cause of action so assigned.

The said admission of facts in the action of Kibbe vs. United Properties Company, and the conditions and stipulations therein contained are hereby referred to and hereby adopted and made a part hereof for all purposes with the foregoing exceptions.

Dated July 1st, 1916.

HERBERT W. ERSKINE,
Attorney for Plaintiff.
R. F. HENSHALL,
Attorney for Defendant." **[105]**

**Stipulation Re Admission of Facts, etc.**

(Title of Court and Cause.)

"STIPULATION.

Whereas the above-entitled action is at issue and ready for trial,

Now, Therefore, the facts set forth in the admission of facts filed in the action of Kibbe vs. United Properties Company, pending in the above-entitled court and bearing No. 15,967½, are hereby admitted subject to the same conditions and stipulations contained in said admission of facts with the following exceptions, which are hereby admitted, to wit:

1. The above-entitled action is commenced not by the persons to whom the certificates referred to in the complaint on file herein, were issued, but by the assignee of several persons each of whom procured the certificate, issued to him or transferred and assigned to him by its previous owner, for a good, valuable and sufficient consideration.

2. Each of the certificates sued upon in the above-entitled action came to the assignors of the plaintiff through the same process that Certificate No. 660, held by the plaintiff, Mary Ellen Kibbe, in the said action of Kibbe vs. United Properties Company, came to her from Certificates numbered 45, 47 and 48. The original certificates in place of which or in place of a portion of which each of the certificates sued on

in the above-entitled action was issued, were delivered to R. G. Hanford or to his nominee in the same manner and at the same time that certificates numbered 45, 47 and 48, referred to in the statement of facts in the case of Kibbe vs. United Properties Company were delivered to him.

3. Each of the certificates referred to in the complaint in the above-entitled action was assigned to the plaintiff therein [106] by the various holders thereof on the respective dates upon which it is alleged in the complaint each certificate was assigned to this plaintiff.

4. At the time each of these assignments was made, all the right, title and interest of the holder of the certificate so assigned in and to the said certificate and in and to any cause of action, claim or demand against the said United Properties Company, its stockholders or directors or officers arising out of or by virtue of said certificate was assigned to the plaintiff in the above-entitled action, and the said plaintiff ever since has been and is now the owner and holder of said certificate and of said claim, demand and cause of action so assigned.

The said admission of facts in the action of Kibbe vs. United Properties Company, and the conditions and stipulations therein contained are hereby referred to and hereby adopted and made a part hereof for all purposes with the foregoing exceptions.

Dated July 1st, 1916.

HERBERT W. ERSKINE,
Attorney for Plaintiff.
R. F. HENSHALL,
Attorney for Defendant." [107]

Mr. HENSHALL.—I will admit that the certificates in this action were issued from the books which have been produced and referred to by Mr. Tevis, and which were kept in the office of the United Properties Company, and I will admit that the bonds have never been issued and that a demand was made.

On cross-examination the witness testified as follows:

I know that Mr. Hanford made two offers to the United Properties Company, offers Nos. 1 and 2. I do not know whether or not certificates Nos. 45, 46, 47 and 48 were issued to Mr. Hanford, pursuant to offer No. 1 or offer No. 2. I assumed that Mr. Erskine was referring to both offers when I answered his questions.

Mr. HENSHALL.—Q. On offer No. 2, Mr. Tevis, was an offer by Mr. Hanford and which has been introduced in evidence, but not directly referred to, but wherein and whereby he offered to deliver to the United Properties Company stock of the Oakland Traction Company and of the San Francisco, Oakland & San Jose Consolidated Railways,—just for the purpose of directing your attention to that?

A. Yes.

Q. And the resolution which counsel himself has introduced specifies the number of shares of stock of those respective companies, common and preferred, which Mr. Hanford was to deliver to the United Properties Company? A. Yes.

Q. Do you know whether or not Mr. Hanford ever delivered to the United Properties Company?

A. Yes. [108]

Q. Do you know whether or not Mr. Hanford ever delivered to the United Properties Company the entire number of shares, common and preferred of the Oakland Traction and of the San Francisco, Oakland & San Jose Consolidated Railways, referred to in offer No. 2? A. I know that he did not.

Q. Can you state accurately or even approximately how much he did not deliver?

A. I think I can state very approximately; he failed to deliver 30,190 shares of preferred stock of the Oakland Traction Company and the San Francisco, Oakland & San Jose Consolidated; I think that is absolutely correct, but I may be mistaken as to a few shares.

Q. Do you know, Mr. Tevis, whether or not there was issued to Mr. Hanford pursuant to offer No. 2, all of the stocks and bonds which he asked to have issued to him pertaining to that offer, notwithstanding his failure to deliver?

A. They were so issued.

On redirect examination, the witness testified as follows:

Mr. ERSKINE.—Q. Approximately, in fractions, how much did Mr. Hanford deliver of the stocks and bonds, which he promised to deliver in offer No. 2?

A. He delivered all of the common stock eventually, and all of the preferred stock with the exception of 30,190 shares, as near as I can recall of the two companies; I can not remember the proportion of each company.

Q. Now, Mr. Tevis, do I understand you to state that [109] you cannot say now whether or not the

certificates 45, 46, 47 and 48 were issued to Mr. Hanford for stocks which he gave under offer No. 1, or for the stock which he gave under offer No. 2?

A. I can answer that in this way,—if that was all of the certificates for bonds that Mr. Hanford received from us,—if it is 10,466—

Q. —10,411?

A. He received no other certificates for offer No. 2; undoubtedly that number of certificates would comprise both offers.

Q. Now, I call your attention to the consideration of the fact that in his offer No. 2 he asks for no certificates or bonds. In his offer No. 2 he asks for 585,803 shares of common stock, 469,646 shares of preferred, and 2,358.579 of the debenture bonds, but he asks for no bonds—no certificates. Now, in view of that fact, can you state whether or not Bonds 45, 46, 47 and 48, were issued to him in compliance with offer No. 1?

A. I will have to answer that in a somewhat roundabout way; a part of the consideration to Mr. Smith for his contribution of these stocks of the Railroad Companies was $3,200,000 worth of these particular certificates; consequently, it seems that the offer must have included both considerations.

Q. The offer is correct as it is written there, is it not? A. I presume that it is correct.

Q. And offer No. 2, as it is written there did not refer to any certificates for bonds, that Hanford was not to get any certificate for the stock he offered in that offer No. 2? [110]

The COURT.—In Offer No. 2.

A. That is a very difficult question to answer.

The COURT.—That is more a question of law than of fact. The witness does not profess to say they were not all issued under Offer No. 1.

A. Those certificates, they were delivered to Mr. Smith—I know that his proportion of those bonds, of the $10,460,000, were delivered to him in consideration of this delivery to the Company through Hanford of the stock of the railroad corporation. There is no question about that fact.

Mr. ERSKINE.—In other words, Mr. Hanford was to pay Mr. Smith some of the bonds he got from Offer No. 1, in order to get him to deliver under Offer No. 2?

A. That appears to be the case; I never knew that before but that appears to be the case.

On recross-examination, the witness testified, as follows:

The United Properties Company was formed pursuant to an agreement between Mr. F. M. Smith, R. G. Hanford and myself, wherein and whereby the respective contributions of each to the Company were set forth. The offers which Mr. Hanford made to the company were offers made pursuant to the terms of the original undertaking between Mr. Smith, Mr. Hanford and myself.

The plaintiff then rested. [111]

Mr. HENSHALL.—Do you admit, Mr. Erskine, so as to save a good deal of time, that no resolution of the Board of Directors of the United Properties Company was ever passed authorizing the issuance of any of the certificates originally or subsequently

upon which you have brought this suit other than the resolution that you yourself have offered in evidence and which you think authorized it?

Mr. ERSKINE.—I will admit that.

The COURT.—No specific resolution—no resolution more specific than the one offered?

Mr. ERSKINE.—No. And the stockholders resolution which I also read.

Mr. HENSHALL.—Will you admit that no attempt even was ever made by this corporation to create a bonded indebtedness to comply with Section 359 of the Civil Code of the State of California?

Mr. ERSKINE—That is admitted. I will admit no attempt was ever made to comply with Section 359 of the Civil Code of the State of California.

Mr. HENSHALL.—That is all, your Honor. [112]

The foregoing was all the evidence in the case.

Thereafter and on the 9th day of July, 1917, the said Court entered its order herein that judgment be entered in favor of the plaintiff in said action and against the defendant in said action in the sum subsequently specified in the judgment, which was then and thereafter entered in each of said actions, to which said ruling, order and decision the said defendant now excepts.

And now, within the time required by law and within the rules of this court, it appearing that the settlement of said bill of exceptions has been continued to the succeeding term, in which said judgment was rendered, the defendant proposes the foregoing as and for his said Bill of Exceptions and

prays that the same may be settled and allowed as correct.

R. P. HENSHALL,
Attorney for Defendant. [113]

**Stipulation Re Settlement of Bill of Exceptions.**

The settlement of the foregoing bill of exceptions having been regularly continued to the present term of court, it is hereby stipulated and agreed that said bill of exceptions may be presented to the Judge who tried the above-entitled case and settled, certified and allowed.

HERBERT W. ERSKINE,
Attorney for Plaintiff.
R. P. HENSHALL,
Attorney for Defendant.

**Order Settling Bill of Exceptions.**

The settlement of the foregoing bill of exceptions having been regularly continued to the present term of court, and said bill of exceptions being now presented in due time and found to be correct, the same is hereby settled, certified and allowed as a true bill of exceptions taken upon the trial of the above-entitled action.

Dated March 13, 1918.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Mar. 13, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [114]

*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, and ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, M. O'CONNELL and HARRY W. DAVIS, as Trustees, Acting for and on Behalf of said THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Defunct Corporation, Substituted Defendants Herein,

Defendants.

**Petition for Writ of Error.**

To the Honorable Court Above-named:

Now come the substituted defendants herein, Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell, and Harry W. Davis, trustees of the original defendant, The United Properties Company of California, who were directors in office at the time said The United Properties Company of California, original defendant herein, forfeited its charter for nonpayment of taxes, and who are made by law the trustees thereof, and acting for and on behalf of said The United Properties Company of California, and as its trustees, and

not otherwise, by their attorney, R. P. Henshall, Esq., and respectfully show that on the 9th day of July, 1917, the said Court entered its order herein that judgment be entered in favor of the plaintiffs in said action and against the defendant in said action. [115]

Your petitioners feel themselves aggrieved by said order and judgment entered thereon, as aforesaid, and herewith petition the Court for an order allowing them to procure a Writ of Error to the Circuit Court of Appeals of the United States, for the Ninth Circuit, sitting at San Francisco, under the laws of the United States in such cases made and provided.

WHEREFORE, the premises considered, your petitioners pray that a writ of error do issue, that an appeal in their behalf to the United States Circuit Court of Appeal, for the Ninth Circuit, sitting at San Francisco, in said Circuit, for the correction of errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by the plaintiffs in error, conditioned as the law directs.

R. P. HENSHALL,
Attorney for Defendant.

Writ of error granted upon the foregoing petition upon the petitioners filing a bond in the sum of $300.00 to be conditioned as required by law.

Dated January 7, 1918.

OSCAR A. TRIPPET,
Judge.

Service of the within Petition and Order is hereby admitted this —— day of January, 1918.

KEYES & ERSKINE,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 7, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [116]

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, and ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, M. O'CONNELL and HARRY W. DAVIS, as Trustees, Acting for and on Behalf of Said THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Defunct Corporation, Substituted Defendants Herein,

Defendants.

**Assignment of Errors.**

Now come the substituted defendants herein, Albert Hanford, W. S. Tevis, C. E. Gilman, Leo. R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, trustees of the original defendant, The United

Properties Company of California, who were directors in office at the time said The United Properties Company of California, original defendant herein, forfeited its charter for nonpayment of taxes, and who are made by law the trustees thereof, and acting for and on behalf of said The United Properties Company of California, and as its trustees, and not otherwise, by their attorney, assign errors in the decision and judgment and in the proceedings herein, as follows, to wit: [117]

I.

The decision and order of said District Court holding and adjudging herein that the complaint of plaintiff herein, in the original action above entitled, stated facts sufficient to constitute a cause of action, and holding that said complaint stated facts sufficient to constitute a cause of action, was and is error and is here assigned as error.

II.

The decision and holding of said District Court that the complaint on file in the above-entitled action need contain no allegation that the bonds referred to in said complaint were certified and were ever ready for delivery, or that an unreasonable time had elapsed for their delivery, was and is error, and is here assigned as error.

III.

The holding and decision of the Court herein to the effect that the original defendant, The United Properties Company of California, had ever made or entered into the contract referred to in said com-

plaint, was and is error, and is here assigned as error. [118]

IV.

The ruling and decision of the Court herein to the effect that a bonded indebtedness of a corporation, to wit, said The United Properties Company of California, can be created either under the laws of Delaware or under the laws of California, without any resolution on the part of the directors authorizing it to be created, was and is error, and is here assigned as error.

V.

The decision of the Court herein that the plaintiffs herein, who purchased the instruments referred to in the complaint herein from R. G. Hanford and who, as the evidence shows, made an offer to the Company at the time he accepted the said instruments and assigned the same to the plaintiffs herein, such instruments not being negotiable, were not bound by and are not chargeable with knowledge and notice of the fact that Section 359 of the Civil Code of the State of California had not been complied with, but are entitled to recover notwithstanding such compliance, was and is error, and is here assigned as error.

VI.

The decision of the Court herein that the instrument in question, which instruments are contracts to create a contract, need not be executed with the same formality with which the contract referred to in said instrument would be required to be executed, was and is here assigned as error.

VII.

The decision of the Court herein that the rights and remedies of the plaintiffs herein, if they have any such rights and remedies, are not in the form of an action for breach of a [119] special contract against the corporation, but are upon a general assumpsit against the corporation or against R. G. Hanford, was and is error, and is here assigned as error.

VIII.

The order and judgment of the Court herein, directing that judgment be entered in favor of the plaintiffs, and each of them, was and is error and is here assigned as error.

IX.

The failure and refusal of the Court herein to order and enter judgment for the defendant upon the permitted and stipulated facts, found in the record herein, was and is error, and is here assigned as error.

X.

The ruling and holding of the trial court, admitting the minutes of February 24, 1911, purporting to be a record of a corporate meeting of The United Properties Company of California, held on that date, was and is error and is here assigned as error,—the same being specified in defendant's bill of exceptions herein, as Exception No. 1.

XI.

The ruling and holding of the Court herein, permitting in evidence, over the objection of defendant, the minutes of the stockholders' meeting of Decem-

ber 5, 1911, purporting to be a record of a meeting of the stockholders of the defendant, The United Properties Company, as of that date, was and is error and is here assigned as error,—the same being designated in [120] said bill of exceptions as defendant's Exception No. 2.

XII.

The ruling and holding of the trial Court herein that the plaintiffs herein were entitled to a judgment against the defendant, The United Properties Company of California, in any sum of money whatever, based upon the alleged cause of action set forth in said complaint, was and is error, and is here assigned as error.

WHEREFORE, these defendants pray that the order and judgment of said District Court of the United States, for the Northern District of California, Second Division, be reversed and that they have such other and further relief in the premises, based upon this assignment of errors, as shall seem meet.

R. P. HENSHALL,
Attorney for Defendant.

Service of the within Assignment of Errors is hereby admitted this —— day of January, 1918.

KEYES & ERSKINE,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 7, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [121]

*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, and ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, M. O'CONNELL and HARRY W. DAVIS, as Trustees, Acting for and on Behalf of Said THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Defunct Corporation, Substituted Defendants Herein,

Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:

That we, the United Properties Company of California, a corporation, and Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, as trustees of the original defendant, The United Properties Company of California, who were directors in office at the time said The United Properties Company of California, original defendant herein, forfeited its charter for nonpayment of taxes, and who are made

by law the trustees thereof, and acting for and on behalf of said The United Properties Company of California, and as its trustees, as principals, and National Surety Company, a corporation organized and existing under the laws of the State of New York and authorized to transact surety business in the State of California, as Surety, are held and firmly bound unto Mary Ellen Kibbe in the sum of Three Hundred ($300) Dollars, lawful money of the United States, to be paid to her and to her [122] executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and each of our successors and assigns, by these presents.

Sealed with our seals and dated this 5th day of January, A. D. 1918.

WHEREAS, the above-named defendants have prosecuted a Writ of Error to the Circuit Court of Appeals of the United States, to reverse the judgment of the District Court of the United States for the Northern District of California in the above-entitled cause;

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendants shall prosecute their said Writ of Error to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

Dated January 5, 1918.

THE UNITED PROPERTIES COMPANY
OF CALIFORNIA.
By R. P. HENSHALL,
Its Attorney.
ALBERT HANFORD,
W. S. TEVIS,
C. E. GILMAN,
LEO R. DICKEY,
S. J. BELL,
M. O'CONNELL,
HARRY W. DAVIS,
As Trustees.
By R. P. HENSHALL,
Their Attorney.
NATIONAL SURETY COMPANY.
[Corporal Seal]
By FRANK L. GILBERT,
Its Attorney in Fact.

(Canceled Documentary Stamp National Surety Co. N. Y., Jan. 5, 1918. Agency at San Francisco.)

Approved January 7, 1918.

OSCAR A. TRIPPET,
Judge. [123]

The premium charged for this bond is Ten dollars per annum.

State of California,
City and County of San Francisco,—ss.

On this fifth day of January in the year one thousand nine hundred and eighteen, before me, Julius Calmann, a Notary Public in and for the City and County of San Francisco, State of California, resid-

ing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the person whose name is subscribed to the within instrument as the Attorney in fact of the National Surety Company, the corporation described in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert acknowledged to me that he subscribed the name of the National Surety Company thereto as principal and his own name as Attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] JULIUS CALMANN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 7, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [124]

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, and AL-

BERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, M. O'CONNELL and HARRY W. DAVIS, as Trustees, Acting for and on Behalf of Said THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Defunct Corporation, Substituted Defendants Herein,

Defendants.

**Prayer for Reversal.**

To the Honorable, the Circuit Court of Appeals of the United States for the Ninth Circuit:

Come now the United Properties Company of California, a corporation, and Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, as trustees of the original defendant, The United Properties Company of California, plaintiffs in error, and pray the Court to reverse the judgment of the District Court of the United States, for the Northern District of California, Second Division, made and entered in the above-entitled cause on the 9th day of July, 1917, and for such other and further relief as may be required from the nature of the cause.

R. P. HENSHALL,
Attorney for Plaintiffs in Error. [125]

Service of the within prayer for reversal is hereby admitted this 3d day of January, 1918.

KEYES & ERSKINE,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 7, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

*In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,967½.

MARY ELLEN KIBBE,

Plaintiff,

vs.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, et al.,

Defendants.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred twenty-six (126) pages, numbered from 1 to 126, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $59.40; that said amount was paid by the attorney for the defendants, and that the orginal writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District

Court, this 29th day of July, A. D. 1918.

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California. [127]

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**Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Mary Ellen Kibbe against The United Properties Company of California, No. 15,967½, on the records of said District Court, said Kibbe being plaintiff and The United Properties Company of California defendant therein, and in which action there has been substituted for the defendant, The United Properties Company of California—Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, who were directors in office at the time the said United Properties Company forfeited its charter under the laws of the State of California for nonpayment of taxes, and who are made by law its trustees, acting for and on behalf of said The United Properties Company of California, a defunct corporation, and which said substitution was made since the rendition of judgment herein, which said mentioned in-

dividuals, as trustees, are now the substituted defendants in said action and are the defendants in error, a manifest error hath happened, to the great damage of the said The United Properties Company of California, and of the substituted defendants therein, to wit, said Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, as trustees, acting for and on behalf of said The United Properties Company of California a defunct corporation, plaintiffs in error, as by their complaint appears:

We being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 7th day of January, in the year of our Lord, One Thousand

Nine Hundred and Eighteen (1918).

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

OSCAR A. TRIPPET,
Judge. [128]

Service of within writ of error admitted this 7th day of January, 1918.

HERBERT W. ERSKINE,
By A. O. K.
Attorney for Plaintiff and Plaintiff in Error.

[Endorsed]: Original. No. 15,967½. United States District Court for the Northern District of California, Second Division. Mary Ellen Kibbe, Plaintiff in Error, vs. The United Properties Company of California et al., Defendants in Error. Writ of Error. Filed Jan. 7, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

**(Return to Writ of Error.)**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule

to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk.

**Citation of Writ of Error.**

UNITED STATES OF AMERICA, ss:

The President of the United States, To Mary Ellen Kibbe, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District for the Northern District of California, Second Division, wherein The United Properties Company of California, and the substituted defendants therein, to wit: Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, as trustees, acting for and on behalf of said The United Properties Company of California, a defunct corporation, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable United States District

Judge for the Ninth Circuit this —— day of January, A. D. 1918.

OSCAR A. TRIPPET,
United States Dist. Judge. **[129]**

Service of within citation and receipt of a copy this 7th day of January, 1918.

HERBERT W. ERSKINE,
By. A. S. K.
Attorney for Plaintiff & Plaintiff in Error.

[Endorsed]: Original. No. 15967½. United States District Court for the Northern District of California, Second Division. Mary Ellen Kibbe, Plaintiff in Error, vs. The United Properties Company of California, a Corporation et al., Defendants in Error. Citation on Writ of Error. Filed Jan. 7, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 3192. United States Circuit Court of Appeals for the Ninth Circuit. The United Properties Company of California, and the Substituted Defendants therein, to wit: Albert Hanford, W. S. Tevis, C. T. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis as Trustees, Acting for and on Behalf of said The United Properties Company of California, a Defunct Corporation, Plaintiffs in Error, vs. Mary Ellen Kibbe, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States

District Court of the Northern District of California, Second Division.

Filed July 31, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 15,967½.

MARY ELLEN KIBEE,

Plaintiff,

vs.

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, and ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, M. O'CONNELL and HARRY W. DAVIS, as Trustees, Action for and on Behalf of said The United Properties Company of California, a Defunct Corporation, Substituted Defendants Herein,

Defendants.

**Order Enlarging Time to and Including March 5, 1918, to File Record and Docket Cause in Appellate Court.**

Good cause appearing therefor it is hereby ordered that the Defendants above named being the Plain-

tiffs in error in said entitled action may have and they are hereby given to and including March 5, 1918 within which to file the record on their writ of error issued in the above-entitled cause, and in which to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, February 6, 1918.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: No. 15967½. Dept. ——. Superior Court United States Circuit Court of Appeals for the Ninth Circuit, State of California. Mary Ellen Kibee, Plaintiff, The United Properties Company, Defendants. Order Enlarging Time to File Record. Filed Feb. 6, 1918. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, et al.,

Plaintiffs in Error,

vs.

MARY ELLEN KIBBE,

Defendant in Error.

**Order Enlarging Time to and Including April 5, 1918, to File Record and Docket Cause in Appellate Court.**

Good cause being shown, it is hereby ordered that

the plaintiffs in error may have to and including the 5th day of April 1918, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 5, 1918.

WM. W. MORROW,

United States Circuit Judge and Judge of the U. S. Circuit Court of Appeals for the Ninth Judicial Circuit.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Apr. 5, 1918, to File Record thereof and to Docket Case. Filed Mar. 5, 1918. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, et al.,

Plaintiffs in Error,

vs.

MARY ELLEN KIBBE,

Defendant in Error.

**Order Enlarging Time to and Including May 4, 1918, to File Record and Docket Cause in Appellate Court.**

Good cause being shown, it is hereby ordered that the plaintiffs in error may have to and including the

4th day of May, 1918, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 4, 1918.

WM. W. MORROW,
Judge of the U. S. Circuit Court of Appeals.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 4, 1918, to File Record thereof and to Docket Case. Filed Apr. 4, 1918. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, et al.,
Plaintiffs in Error,
vs.
MARY ELLEN KIBBE,
Defendant in Error.

**Order Enlarging Time to and Including June 3, 1918, to File Record and Docket Cause in Appellate Court.**

Good cause being shown, it is hereby ordered that the plaintiffs in error in the above-entitled cause may have to and including the 3d day of June, 1918, within which to file the record on writ of error and docket the cause in the United States Circuit Court

of Appeals for the Ninth Circuit.

Dated May 3, 1918.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to June 3, 1918, to File Record Thereof and to Docket Case. Filed May 3, 1918. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Judicial Circuit.*

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation, et al.,

Plaintiffs in Error,

vs.

MARY ELLEN KIBBE,

Defendant in Error.

**Order Enlarging Time to and Including July 3, 1918, to File Record and Docket Cause in Appellate Court.**

Good cause being shown, it is hereby ordered that the plaintiffs in error in the above-entitled cause may have to and including July 3, 1918, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated June 3, 1918.

WM. W. MORROW,
Judge of the U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 10 Enlarging Time to July 3, 1918, to File Record Thereof and to Docket Case. Filed Jun. 3, 1918. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Judicial Circuit.*

UNITED PROPERTIES COMPANY OF CALIFORNIA, a Corporation,
Plaintiffs in Error,

vs.

MARY ELLEN KIBBE,
Defendant in Error.

**Order Enlarging Time to and Including August 2, 1918, to File Record and Docket Cause in Appellate Court.**

Good cause being shown, it is hereby ordered that the plaintiffs in error in the above-entitled cause may have to and including the 2d day of August, 1918, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated July 2, 1918.

WM. H. HUNT,
Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 10 Enlarging Time to Aug. 2/1918 to File Record Thereof and to Docket Case. Filed Jul. 2, 1918. F. D. Monckton, Clerk.

[Endorsed]: No. 3192. United States Circuit Court of Appeals for the Ninth Circuit. 6 Orders Under Rule 10 Enlarging Time to Aug. 2, 1918, to File Record Thereof and to Docket Case. Refiled Jul. 31, 1918. F. D. Monckton, Clerk.

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*In the United States Circuit Court of Appeals, in and for the Ninth Circuit.*

No. 3191.

UNITED PROPERTIES COMPANY OF CALIFORNIA et al., etc.,

Plaintiffs in Error,

vs.

EDMUND J. BURKHARDT,

Defendant in Error.

No. 3192.

UNITED PROPERTIES COMPANY OF CALIFORNIA et al., etc.,

Plaintiffs in Error,

vs.

MARY ELLEN KIBBE,

Defendant in Error.

No. 3193.

UNITED PROPERTIES COMPANY OF CALIFORNIA et al., etc.,

Plaintiffs in Error,

vs.

EDMUND J. BURKHARDT,

Defendant in Error.

**Stipulation and Order That Cases Nos. 3191 and 3193 shall Abide Decision of Case No. 3192 and That Transcripts of Record in Cases Nos. 3191 and 3193 Need not be Printed.**

It is hereby stipulated by and between the parties hereto as follows:

1. That the decision upon the Writs of Error taken out in the two cases above entitled, Nos. 3191 and 3193, shall abide by and be governed by the decision rendered by the above-entitled court in cause No. 3192.

2. That the record in causes Nos. 3191 and 3193, above entitled, need not be printed but that the writs of error in the above-entitled causes may be submitted to the Court upon the record in cause No. 3192 and upon the arguments made therein.

3. That the entire record in cause No. 3192 shall be printed by the clerk of the above-entitled court.

The above stipulation shall be effective only in the event that it shall be approved by the above-entitled court.

Dated August 28th, 1918.

R. P. HENSHALL,
Attorney for Plaintiffs in Error.
KEYES and ERSKINE,
Attorneys for Defendant in Error.

On reading the above stipulation and good cause appearing therefor,—IT IS ORDERED that the record be made up and printed as therein provided.

Done and dated this 29th day of August, 1918.

WM. W. MORROW,
WM. H. HUNT,
_____,
Judges of U. S. Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: Nos. 3191, 3192, 3193. Original. U. S. Circuit Court of Appeals, Ninth Circuit, State of California. United Properties Company of California et al., etc., Plaintiffs in Error, vs. Edmund J. Burkhardt, Defendant in Error, etc. etc. Stipulation and Order That Cases Nos. 3191 and 3193 shall Abide Decision, etc., in Case No. 3192, etc. Filed Aug. 29, 1918. F. D. Monckton, Clerk.

No. 3192

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, and the substituted defendants therein, to-wit: ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, S. J. BELL, M. O'CONNELL and HARRY W. DAVIS, as Trustees, acting for and on behalf of said THE UNITED PROPERTIES COMPANY OF CALIFORNIA (a defunct corporation),

*Plaintiffs in Error,*

vs.

MARY ELLEN KIBBE,

*Defendant in Error.*

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

## BRIEF FOR PLAINTIFFS IN ERROR.



R. P. HENSHALL,
*Attorney for Plaintiffs in Error.*

No. 3192

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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THE UNITED PROPERTIES COMPANY OF CALIFORNIA, and the substituted defendants therein, to-wit: ALBERT HANFORD, W. S. TEVIS, C. E. GILMAN, LEO R. DICKEY, S. J. BELL, M. O'CONNELL and HARRY W. DAVIS, as Trustees, acting for and on behalf of said THE UNITED PROPERTIES COMPANY OF CALIFORNIA (a defunct corporation),

*Plaintiffs in Error,*

vs.

MARY ELLEN KIBBE,

*Defendant in Error.*

**Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.**

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## BRIEF FOR PLAINTIFFS IN ERROR.

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### Statement of the Case.

This was an action at law commenced in the state court, transferred by the defendant to the Federal

court, and there tried before the court without a jury. There is but little dispute as to the facts, most of them having been stipulated to in the court below. The action was for damages, with a breach of an agreement, and the judgment sought to be reviewed by the writ of error in this case directed that judgment be entered in favor of plaintiff and against defendant in the sum of $15,925, together with costs. The case is a companion case to two others, the decision of which will be controlled by these cases, Burkhardt v. United Properties Company, No. 15968, and Burkhardt v. United Properties Company, No. 15979, in which judgments were rendered for the plaintiffs therein in the sums of $111,024.50 and $118,849.75, respectively. Claims similar to the ones involved in the three cases for argument here aggregate something over a million dollars. Some cases are pending in the state courts, to which attention will presently be directed. The magnitude of the interests involved, therefore, justify a somewhat detailed presentation of the issues involved where the rights of third persons are so materially affected by the decision, as will be the case here. In this case the complaint, after alleging the corporate character of the United Properties Company, averred that on the 15th day of February, 1912, the defendant undertook and agreed in writing for a valuable consideration to deliver to the plaintiff and to the predecessor of plaintiff an instrument in writing, the legal effect of which is pleaded as follows:

It is averred that the defendant so undertook to deliver to

> "Ira M. Condit and Mary Ellen Kibby as joint owners or the survivor of them or order thirteen of its first mortgage and collateral trust five per cent fifty year sinking fund gold bonds of the denomination of $1,000 each with all interest coupons attached, said bonds to be issued under and secured by a deed of trust dated January 1st, 1911, then in course of preparation made by the said defendant and so to be delivered under, as and when said bonds might be certified, issued and ready for delivery;"

The instrument itself is annexed to the complaint, marked Exhibit "A" and will be later referred to in detail. It is then alleged that on the 13th day of September, 1915, which would be three years lacking two days from the date when the instrument was made, the plaintiff demanded of the defendant that it execute and deliver to plaintiff the 13 first mortgage and collateral gold bonds, referred to, and that the defendant failed, refused and neglected to deliver them. It is further alleged that the bonds have never been executed and delivered at all, and that the deed of trust, referred to, has never been executed. It is also alleged at the time of the demand the plaintiff tendered to the defendant the agreement referred to and offered to surrender it to the defendant. Proceeding, the complaint alleges that no part of the sum of $13,000, referred to in the instrument, has been paid, and that had the bond referred to been executed, and delivered, it would have been of the value of $13,000, and that by

reason of the premises the plaintiff has been damaged in the sum of $13,000.

The answer sets forth several defenses. It first denies that on the 15th day of February, 1912, or at any time, the defendant made the agreement referred to. It denies that the bonds, had they been delivered, would have been of the value of $13,000 or of any other sum, and denies damage.

As a first affirmative defense the answer alleged that on or about the 16th day of February, 1911, certain of the officers of The United Properties Company issued to one R. G. Hanford an instrument similar in form and tenor to the instrument set out by plaintiff in the complaint; that this instrument was thereafter surrendered and re-issued in different forms, transferred by mean assignments until finally it passed into the possession of one R. B. Mott, who surrendered it, and that the instrument sued upon was issued in lieu thereof. It is then alleged that no resolution of the board of directors was ever passed authorizing the execution of the instrument sued on by plaintiff, or of any of the instruments issued to its predecessors, and it is further alleged that no meeting of the stockholders was ever called or held at which any vote was taken authorizing the issuance or execution of said instrument sued on by plaintiff, or of any of the instruments which preceded it. It is further alleged that a bonded indebtedness was never created by the written assent of the stockholders of The United Properties Company holding two-thirds of its cap-

ital stock or, indeed, any part of its capital stock, and that no attempt had ever been made by the directors, trustees or officers to comply with the provisions of Section 359 of the Civil Code of the State of California relating to the creation or increase of the bonded indebtedness, or indebtedness of any kind. In this defense it is further alleged that the said R. G. Hanford at the time the instrument first referred to was issued was a stockholder of the corporation and one of its board of directors, anud that he had notice and knowledge of all of the facts herein recited. The other defenses set forth in the answer are that it is barred by the provisions of Sections 359, 338 and 339 of the Code of Civil Procedure of the State of California. Upon these issues and in the light of the facts hereinafter to be developed, the following issues of law arise for determination:

1st. Does the complaint state a cause of action, that is, assuming, as we must, that an agreement has been plead, does the complaint show facts disclosing a breach of this agreement?

2nd. Was this agreement ever made by the defendant?

3rd. If not originally made, was it ever ratified or approved in any way so as to give plaintiff a cause of action upon it?

4th. Is there any proof in any event that the plaintiff has been damaged in any sum of money whatever?

5th. Is the cause of action barred by any statute of limitations?

As the first question arises solely upon the complaint, we have deemed it advisable to postpone a statement of the facts in detail until we arrive at that point in the argument where these facts are necessary to be stated to consider the legal questions there arising, and in accordance with the rules of the court, we now present the Assignment of Errors:

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## Assignment of Errors.

Now come the substituted defendants herein, Albert Hanford, W. S. Tevis, C. E. Gilman, Leo R. Dickey, S. J. Bell, M. O'Connell and Harry W. Davis, trustees of the original defendant, The United Properties Company of California, who were directors in office at the time said The United Properties Company of California, original defendant herein, forfeited its charter for nonpayment of taxes, and who are made by law the trustees thereof, and acting for and on behalf of said The United Properties Company of California, and as its trustees, and not otherwise, by their attorney, assign errors in the decision and judgment and in the proceedings herein, as follows, to wit:

I.

The decision and order of said District Court holding and adjudging herein that the complaint of plaintiff herein, in the original action above en-

titled, stated facts sufficient to constitute a cause of action, and holding that said complaint stated facts sufficient to constitute a cause of action, was and is error and is here assigned as error.

II.

The decision and holding of said District Court that the complaint on file in the above-entitled action need contain no allegation that the bonds referred to in said complaint were certified and were ever ready for delivery, or that an unreasonable time had elapsed for their delivery, was and is error, and is here assigned as error.

III.

The holding and decision of the court herein to the effect that the original defendant, The United Properties Company of California, had ever made or entered into the contract referred to in said complaint, was and is error, and is here assigned as error.

IV.

The ruling and decision of the court herein to the effect that a bonded indebtedness of a corporation, to wit, said The United Properties Company of California, can be created either under the laws of Delaware or under the laws of California, without any resolution on the part of the directors authorizing it to be created, was and is error, and is here assigned as error.

V.

The decision of the court herein that the plaintiffs herein, who purchased the instruments referred to in the complaint herein from R. G. Hanford, and who, as the evidence shows, made an offer to the company at the time he accepted the said instruments and assigned the same to the plaintiffs herein, such instruments not being negotiable, were not bound by and are not chargeable with knowledge and notice of the fact that Section 359 of the Civil Code of the State of California had not been complied with, but are entitled to recover notwithstanding such compliance, was and is error, and is here assigned as error.

VI.

The decision of the court herein that the instrument in question, which instruments are contracts to create a contract, need not be executed with the same formality with which the contract referred to in said instrument would be required to be executed, was and is here assigned as error.

VII.

The decision of the court herein that the rights and remedies of the plaintiffs herein, if they have any such rights and remedies, are not in the form of an action for breach of a special contract against the corporation, but are upon a general assumpsit against the corporation or against R. G. Hanford, was and is error, and is here assigned as error.

VIII.

The order and judgment of the court herein, directing that judgment be entered in favor of the plaintiffs, and each of them, was and is error, and is here assigned as error.

IX.

The failure and refusal of the court herein to order and enter judgment for the defendant upon the permitted and stipulated facts, found in the record herein, was and is error, and is here assigned as error.

X.

The ruling and holding of the trial court, admitting the minutes of February 24, 1911, purporting to be a record of a corporate meeting of The United Properties Company of California, held on that date, was and is error, and is here assigned as error,—the same being specified in defendant's bill of exceptions herein as Exception No. 1.

XI.

The ruling and holding of the court herein, permitting in evidence, over the objection of defendant, the minutes of the stockholders' meeting of December 5, 1911, purporting to be a record of a meeting of the stockholders of the defendant, The United Properties Company, as of that date, was and is error and is here assigned as error,—the same being designated in said bill of exceptions as defendant's Exception No. 2.

XII.

The ruling and holding of the trial court herein that the plaintiffs herein were entitled to a judgment against the defendant, The United Properties Company of California, in any sum of money whatever, based upon the alleged cause of action set forth in said complaint, was and is error, and is here assigned as error.

Wherefore, these defendants pray that the order and judgment of said District Court of the United States, for the Northern District of California, Second Division, be reversed and that they have such other and further relief in the premises, based upon this assignment of errors, as shall seem meet.

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## Brief of the Argument.

### I.

#### THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

A summary of the complaint has already been presented and it only remains necessary to quote Exhibit "A", which reads as follows:

"BOND CERTIFICATE

Number 660.

| | |
|---|---|
| For First Mortgage and Collateral Trust Five Per Cent. Number | Par Value of Bonds $13,000.00 Fifty-Year Sinking Fund Gold Bonds |

THE UNITED PROPERTIES COMPANY OF CALIFORNIA.

The United Properties Company of California, a corporation organized and existing un-

der the laws of the State of Delaware, for value received, promises to deliver to Ira M. Condit and Mary Ellen Kibby as joint owners, or the survivor of them, or order, upon the surrender of this certificate duly endorsed, thirteen of its 'First Mortgage and Collateral Trust Five Per Cent Fifty Year Sinking Fund Gold Bonds', of the denomination of one thousand dollars ($1,000.00), each with all interest coupons thereto attached, said bonds to be issued under and secured by the Deed of Trust in preparation dated January 1, 1911, made by said The United Properties Company of California, and to be delivered hereunder as and when the said bonds may be certified and ready for delivery.

In witness whereof, said The United Properties Company of California has hereunto caused its corporate name to be signed and its corporate seal to be affixed by its President or one of the Vice-Presidents and Treasurer or Assistant Treasurer thereunto duly authorized, this 15th day of February, 1912.

THE UNITED PROPERTIES COMPANY
OF CALIFORNIA.

W. K. Alberger,
Vice-President.

A. G. Raycraft,
Asst. Treasurer."

Endorsed on Certificate:

"Interest from Jan. 1st to July 1st, 1911, amounting to $325.00, paid July 1st, 1911, $25.00 Nov. 18, 1911, $300.

A. G. Raycraft,
Asst. Treasurer.

"Interest from July 1st, 1911, to Jan. 1st, 1912, amounting to $325.00, paid Jan. 2nd, 1912.

A. G. Raycraft,
Asst. Treasurer.

"Interest from Jan. 1st, 1912, to July 1st, 1912, amounting to $325.00, paid July 1st, 1912.

A. G. Raycraft,
Asst. Treasurer.

"Interest from July 1st, 1912, to Jan. 1st, 1913, amounting to $325.00, paid January 2nd, 1912.

A. G. Raycraft,
Asst. Treasurer.

"For value received ..... hereby sell, assign and transfer unto ..... the within Bond Certificate for ..... bonds of the within named company, represented by the said Bond Certificate, and do hereby irrevocably constitute and appoint ..... attorney to transfer the said Bond Certificate, or to exchange the same for the bonds represented thereby, with the full power of substitution in the premises.

Dated ....., 19.....

.....

In the presence of

....."

The language of this instrument is very peculiar, and is unlike anything to which our attention has been directed. It contains a promise that the defendant will deliver, but when it will so deliver is not stated, to the persons therein named, 13 of its First Mortgage and Collateral Trust Five Per Cent Fifty Year Sinking Fund Gold Bonds of the denomination of $1000 each, with coupons attached. Beyond this, and except in a respect presently to be noted, the bonds are not identified. It is stated, however, that these bonds are to be issued under and secured by the "deed of trust in preparation dated

January 1, 1911", the instrument referred to being dated the 15th day of April, 1912. This instrument, it is stated, is made by the defendant and the bonds referred to "are to be delivered hereunder as and when the said bonds may be certified and ready for delivery". The terms and conditions of this deed of trust are nowhere stated, nor are any of the terms and conditions of the bonds stated other than that they are to be secured by a deed of trust. From the recital that they are first mortgage, it must be presumed that they would be first mortgage bonds. From the use of the words "five per cent" we presume the rate of interest is five per cent. From the use of "sinking fund gold bonds" it is to be inferred that there is to be a sinking fund and that the bonds are to be payable in gold, and from the expression "fifty year" we can infer that the principal would fall due fifty years from date. But in all other respects the nature and character of these bonds and of the deed of trust referred to are nowhere stated.

A multitude of questions in this regard at once suggest themselves. On what property were these bonds to be a lien? How often is interest to be paid? What happens if interest is not paid? Who is to be the trustee in whose name the legal title is to rest? What are the nature, terms and conditions of the sinking fund referred to?

Other questions will occur to the mind, indicating the lack of precision, and many uncertainties found in this instrument. These questions are mentioned by us merely to exemplify the character of the ob-

jections going to the sufficiency of the complaint, which are as follows:

(1) If the promise set forth in this instrument is a promise of anything, it is a promise to deliver said First Mortgage and Collateral Five Per Cent Fifty Year Sinking Fund Gold Bonds under the deed of trust designated and they are "to be delivered hereunder as and when the said bonds may be certified and ready for delivery". The promise to deliver bonds, which is not said to be upon any definite date, is agreed to be made "as and when the said bonds may be certified and ready for delivery". It may be conceded, of course, that the corporation could not refuse to execute the deed of trust and could not indefinitely postpone a delivery of the bonds, but on the other hand, it was not contemplated by the parties that an immediate delivery should be had, for they were to be delivered only when they were certified and ready for delivery. There is no allegation that these bonds were ever certified or were ever ready for delivery, so that the failure to deliver them was not due to any default after they were certified or ready for delivery, and the absence of any allegation that they were certified or were ready for delivery renders the complaint totally insufficient as a statement of a cause of action so far as this aspect of the case is concerned.

(2) The next question then arises: When did the company default in its obligations to deliver

these bonds? The instrument in this case was executed on the 15th day of February, 1912, and the deed of trust, referred to as in preparation, was dated January 1, 1911. The defendant evidently was not in default a day after the 15th day of February, 1912. Was it in default on January 1, 1912? It could not have been in default on January 1, 1912, though interest apparently was paid from that date, because it was issued later. But was it in default on July 1, 1912, when the plaintiff accepted interest to January 1, 1913? Manifestly it was not in default on January 1, 1913, because plaintiff had accepted interest until that date. As it could not have been in default on January 1, 1913, whether or not it was in default afterwards depends upon a variety of conditions and circumstances, none of which, however, is stated in the complaint. The rule of pleading, of course, is that it must be construed most strongly against the pleader. And here not alone is there an absence of any allegation showing the company to have been in default, but the complaint, by showing that plaintiff accepted interest up to January 1, 1913, in a measure excludes the idea that up to that date it could have been in default. So far, therefore, as the complaint is concerned,—except with respect to the fact that it does allege that later a demand was made, which was refused,—there is nothing in these allegations to show that a cause of action was stated.

(3) What will doubtless be contended is that what is meant by this clause of the contract is that

the defendant had a reasonable time within which to perform the act agreed upon. Here, however, other differences arise. If this be so, then the complaint ought to allege facts from which the court can conclude, as a matter of law, that the time has elapsed and is unreasonable. If the complaint alleged that from and after a certain date an unreasonable time had elapsed and that the defendant had failed within that reasonable time to perform its obligation, a different question would have been presented. And that some time had to elapse before the bonds were to be delivered is apparent from the instrument itself, which refers to them as being secured by a deed of trust in preparation, and by the fact that they were to be delivered as and when they were certified and ready for delivery.

(4) We now reach the allegation that on the 13th day of September, 1915, the delivery of the bonds was demanded and refused. It must be remembered, however, that they were to be delivered only as and when they were certified and ready for delivery. There is no allegation, as we have pointed out, that they were then certified and ready for delivery, and there is no allegation that they ought to have been certified and ready for delivery by that time. The refusal to deliver them may, therefore, not have been improper, but the very thing which the defendant ought to have done, and some force is lent to this objection by the fact that the complaint does allege that the deed of trust was not prepared. If the deed of trust was not prepared, of

course the refusal to deliver the bonds was justifiable unless the failure to prepare the deed of trust was wrongful. There is no allegation whatever upon the subject in regard to the deed of trust other than that it was not executed. There is no charge made that it ought to have been executed by a given time; there is no allegation that there was no reason why it should not have been executed; we are left wholly to speculation and conjecture as to when this deed of trust was to be completed, and we are left to a presumption in a complaint that because a certain period of time had elapsed, during a part of which at least it must be conceded the failure to execute and deliver was legal, the whole time nevertheless was unreasonable and unlawful. How a presumption of an allegation can exist in a complaint, in view of the rule that pleadings must be construed against the pleader, is not clear to us.

(5) And here we come back to the vice in this allegation. The complaint shows that the deed of trust was not executed, that interest was paid on the instrument up to January 1, 1913. If the deed of trust was not executed it follows, as we have already stated, that the failure to deliver the bonds was legal. The cause of action in that respect is not stated, and as there is no allegation with respect to the reason why the deed of trust was not executed, there is no cause of action stated in any aspect. Indeed, it is very clear that the complaint counts upon a refusal to certify and deliver bonds. There is no allegation showing that this delivery

was improper. It does not count upon a refusal or failure to execute a deed of trust, and this being so, the allegation with respect to the nonexecution of the deed of trust does not aid the plaintiff.

(6) None of these points is technical, as at first blush may appear to be the case. A correct answer to the questions above propounded is necessary in order to determine when the cause of action arose, for from the moment when the cause of action arose the statute of limitations began to run, but not before, and how can the court fix the date when the statute of limitations commenced to run without some allegation that will enable it to ascertain when the cause of action arose. For example: suppose six or seven years had elapsed. It is very plain that the breach of the agreement did not occur the day after the instrument was signed; the statute of limitations did not commence to run on that date. But if it did not commence to run on that day, when did it commence to run, and if a period of six or seven years had elapsed it could not be told whether the cause of action was or was not barred without knowing some specific date when the statute commenced to run. The complaint in the present case is barren of any allegation from which anybody can infer when the cause of action arose, or when the statute began to run, and in consequence, therefore, it is open to the general objections specified.

(7) Aside from the foregoing objections there are two others that ought briefly to be mentioned here, but which will receive some discussion post, as follows:

(a) Before a contract can be the foundation of an action, even an action at law, it must be sufficiently definite and certain within the rules of law. The present contract is a promise to deliver, upon the surrender of the certificate, 13 first mortgage bonds of the denomination of $1000 each, with interest coupons attached, which were to be secured by deed of trust in course of preparation. The uncertainties, however, are patent, and are such as amount to the equivalent of no contract at all.

What, for example, if any, remedy would be available to the holder of the bonds in the event of default in the payment of interest? Could he sue at once, or would he have to wait until the principal fell due? What would be the duties of the trustee? Would the trustee be entitled to compensation under any circumstances? Would the trust deed in due and legal form, specified in the contract relied upon, have included a provision for the substitution and replacement of securities from time to time? Who is to collect the income from the pledged securities? What, if any, limitations would there be on the right of the bondholders to maintain judicial proceedings? How would the pledged property be sold in the event of default? These circumstances, therefore, lead us to the belief that under the au-

thorities this contract was void for lack of certainty to such an extent that it could not be the foundation of any right in a court of justice.

See:

National Elec. Signaling Co. v. Fessenden, 207 Fed. 915; 125 C. C. A. 363;

Jones v. Vance Shoe Co., 115 Fed. 707; 53 C. C. A. 289;

Baurman v. Binzen, 16 N. Y. S. 342;

Elks v. North State L. Ins. Co., 159 N. C. 619; 75 S. E. 808;

Prior v. Hilton, etc. Co., 141 Ga. 117; 80 S. E. 559.

In this regard it is to be observed that this agreement is distinctly,—if it is any agreement at all,—an agreement to deliver personal property. *It is not an agreement evidencing a money obligation to be satisfied, however, by the delivery of personal property.* In that event it is well settled law that if the personal property is not delivered the promise is regarded as a promise to pay money. For example: If this had been a promise to pay $50,000, to be delivered in bonds, then the failure to deliver the bonds would give rise to a perfect cause of action for the recovery of the money.

See:

Beckwith v. Sheldon, 168 Cal. 742.

This, however, is a specific obligation, for instance, to deliver personal property and the kind of

personal property, the nature, extent and character of the personal property should, in consequence, be specified with precision in order to give rise to the pledge.

It has been contended that the offer when accepted was an authorization, but the authority has not been pointed out by which any officer could lawfully issue a certificate promising to deliver first mortgage and collateral trust five per cent fifty-year sinking fund gold bonds to be secured either by a mortgage or a trust deed, apparently, the terms of which are specified in no regard whatsoever. Can anyone say what it is that the certificate pledges to set aside as security for the bonds? Is it all the property of the corporation, or is it only some of the property which has been called worthless? In the event of default, how were the proceeds of this property to be obtained and applied to the fulfillment of the promises? That this vague, uncertain thing was that which was authorized is unthinkable.

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## II.

### THE CONTRACT SUED ON WAS NEVER MADE BY DEFENDANT.

It is admitted that it was never authorized by its board of directors unless its authorization was effected by the acceptance of the Hanford proposition, Nos. 1 and 2. But the acceptance of these propositions cannot be treated as an authorization for the issuance of the instruments sued upon. Mr.

Hanford offered to give to the company certain stocks and bonds of other companies in consideration that certain stocks and bonds of the defendant be issued to him; and he provided in his agreement that in the event that the "*permanent*" bonds and debentures he designated were not available that he would accept "in lieu thereof certificates for such bonds *authorized* and issued by you". The position of Mr. Hanford in this respect was quite clear. He presupposed, of course, a resolution creating a bonded indebtedness. If, when the corporation had set in motion the machinery for the creation of such bonded indebtedness, it did not have within the time specified,—which was thirty days,—the "permanent" first mortgage bonds, then Mr. Hanford, in that event, agreed to accept certificates for such bonds which could subsequently be exchanged for the bonds when they were issued and ready for delivery. This, of course, was Mr. Hanford's proposition to the company and this was the proposition that was accepted.

Now, it is admitted in the present case, that no steps of any kind were ever taken towards the creation of the bonded indebtedness. The certificates issued, while calling for the exchange of the permanent bonds which were to be issued under a bonded indebtedness then created, were not the certificates referred to in the Hanford offer, for the reason that no bonded indebtedness had been created to which they could apply. *They were not alone*,

*therefore, not the certificates referred to in the Hanford offer, but they were not authorized by the company to be issued at all, under any circumstances.* If we suppose that the bonded indebtedness had been created by resolution of the board of directors; that the permanent bonds were not issued and ready for delivery; that Mr. Hanford had then offered stocks and bonds for exchange for these permanent bonds and had agreed to accept temporary certificates, subsequently to be exchanged for the permanent bonds, we will have a case which would be analogous to the case alleged in the complaint. For the corporation having taken the step to create the bonded indebtedness could, of course, promise that it would deliver the bonds when the bonds were ready for delivery and could give certificates for such bonds to be exchanged for them subsequently; and for a breach of such a promise contained in the certificate it would be liable to the holder in damages or, for that matter, it might have been compellable specifically to deliver the bonds. But this was not the case proved at the trial. For when no act leading toward the creation of a bonded indebtedness had been taken, the issuance of a certificate in the name of the corporation without any resolution to that effect, was not alone not the certificate referred to in the offer of Mr. Hanford and which alone the corporation was authorized to issue, but it was, in fact, not the act of the corporation, for there was no bonded debt to which the certificate could apply.

We may dismiss from this case at once all question of the necessity for any action on the part of the stockholders leading toward the creation of a bonded debt. Under the laws of Delaware the consent of the stockholders is not necessary to the creation of a bonded debt and the Supreme Court of this state has held that a bonded debt created without the consent of the stockholders is not void. All such questions we allude to in passing only, to clear the atmosphere in this case.

A bonded debt, however, cannot be created under the laws of Delaware, nor in California, nor in any other state, so far as we are aware, without a resolution on the part of the directors authorizing it to be created. Now, in the instant case, it is admitted that no resolution of any kind was ever passed authorizing the creation of a bonded debt. The certificate in question, therefore, being a certificate by the corporation, having relation to a bonded debt which was not created, was void; for surely the corporation could not promise something with respect to a bonded debt when it had not created it. It is settled law that, except in those instances in which the law of estoppel applies, a corporation must act by resolution of its board of directors.

We have then here two points: First, the bonded debt, or the creation of the bonded debt, to which this certificate applies, was never authorized. To make this point clear, suppose a bond had been issued in the name of the corporation, but no action

on the part of the board of directors authorizing the issuance of such bond had been taken. Obviously, it could not bind the corporation. Now, here, if we assume the certificate sued upon (which assumption is erroneous) to have been authorized by the board of directors, there was no bonded indebtedness created to which it could apply.

But, secondly, the certificate in question was not the certificate which the corporation itself was authorized to issue; for that certificate contemplated, as we have shown, the previous creation of a bonded debt, and that in lieu of the permanent First Mortgage Bonds to be issued thereunder, there should be issued a certificate which should provide that they should be exchangeable for First Mortgage Bonds as and when they were ready for delivery. Both of these conditions are lacking in the present instance, and, in consequence, the promise is not the act of the corporation.

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## III.

### NO RATIFICATION OR ESTOPPEL HAS BEEN SHOWN WHICH WOULD GIVE RISE TO A RIGHT OF ACTION IN PLAINTIFF.

Mr. Hanford made the offers in question to the directors. Mr. Hanford was one of the founders of the company and one of its directors. The consideration moved from Mr. Hanford to The United Properties Company of California, and the certificates in question were issued to him. They can

have no other or greater validity than they would have if they were in his possession and if he were now suing the company—for they are not negotiable. The consideration passing between Mr. Hanford and the present owners has not been shown, nor would it make any difference to the law of the case whether this latter consideration were valuable or not. Mr. Hanford knew, as one of the directors, that the bonded indebtedness had never been created, and he therefore was in nowise deceived or misled by the issuance to him of the certificates in question. This is not the case of a person dealing with a corporation, unaware of the facts under such circumstances as that the law will estop the corporation from denying its representations. Here, in point of fact, Mr. Hanford knew, for he was one of the organizers of the company and we understand counsel admits that he had actual knowledge that Section 359 had not been complied with.

It follows, therefore, that this is simply a case of a person accepting the apparent obligation of the company, having actual knowledge and notice that it was not, in fact, the obligation of the company. All question of estoppel at once vanishes out of the case. Here we have an explanation of the situation, or at least we are given sufficient light in this case, to understand why this singular situation has arisen. It appears from the testimony of Mr. Tevis that the offers made by Mr. Hanford—Nos.

1 and 2—were made by him as part of a general plan or scheme. Such, indeed, is the fact; for they were made pursuant to a pre-merger agreement between F. M. Smith and W. S. Tevis. See the agreement annexed to the stipulated facts wherein time is given Smith to perform his part of the agreement.

The company referred to in this agreement was The United Properties Company, and it was formed to carry out this understanding. But it is in the admitted facts that Mr. Smith failed to make to Mr. Hanford, or to The United Properties Company, a delivery of the stocks and bonds promised by him. An interesting question here arises. As it was clearly the intention of Smith and Hanford that there should be conveyed to The United Properties Company certain stocks and bonds, for which certain certificates of that company should be issued to them, and as it is an admitted fact that the requisite considerations were never delivered to The United Properties Company, can it be estopped from denying its liability upon the instrument issued upon the face of these promises unperformed?

In this connection it is important to note that the offer of Hanford (Transcript, p. 69) reads in part, "For and in exchange for all of said stock, and *as the consideration for the delivery thereof to you,* I hereby offer to accept from you", etc. If this offer was accepted, then it was accepted, as the offer

reads, *on the condition of the delivery of the stock.* And as the delivery was never made, as is admitted, the condition of the alleged acceptance was never fulfilled, and for this reason alone the acceptance would be of no binding value. As the plaintiff stands in the shoes of Hanford, who had full knowledge of this vice in the agreement, was in fact responsible for it, he has no better right than Hanford, and it certainly cannot be claimed that Hanford, not having performed, could have recovered in such an action.

Further, as the authorization, if any there was, was coupled with a conditional acceptance, the condition of which was never fulfilled, it is clear that the authorization was never an absolute one. In this respect as well, then, it is clear that the act done was not the act of the corporation.

There are, however, still other objections to the maintenance of this suit. The instrument sued on is a promise to create a mortgage and it is sued upon as such. The complaint counts upon a breach of a contract to create a mortgage. A contract to create another contract must at least be executed with the same formality as the contract itself. It would be a singular thing to enforce a contract to create a contract executed with less formality than the contract itself would require if executed. In California a mortgage, not authorized by the directors, is void.

See:

Curtin v. Salmon River, etc., 130 Cal. 345.

And a contract to create a mortgage not authorized by the directors must be void. We have the exact case here. It is admitted that the mortgage was never created and was never authorized by the directors, and we think that it has been practically admitted, or if not admitted, shown, that the instrument sued on was never authorized by the directors. No action, therefore, under the case of Curtin v. Salmon River, etc., can be maintained upon it. This case was approved by the Supreme Court of the United States in Williams v. Gaylord, 186 U. S. 164.

The case of Curtin v. Salmon River, etc., also disposes of counsel's contention with respect to the ratification by the stockholders; for in that case it was held that as the mortgage had never been authorized by the directors it could not be ratified by the stockholders, nor could they authorize it. *The alleged resolutions, therefore, by the stockholders, introduced in this case, purporting to ratify everything that had been done, become of no moment.* The doctrine of Curtin v. Salmon River, etc., is reaffirmed in Riley v. Campbell, 134 Cal. 175.

See:

Blair v. Brownstone Oil, etc., 168 Cal. 632.

There is a special reason in California why this doctrine is so. A mortgage upon real property can

only be created by certain formalities which must be pursued in writing.

See the case of Blood v. La Serena L. & W. Co., 113 Cal. 221, where the whole subject is discussed. The authority of the president and secretary to execute it on behalf of the corporation must be given them in writing (Id.). Of course, therefore, an agreement to execute a mortgage must be executed with the same formality and must be in writing. And here we have disposed of counsel's plea of ratification. The case of Blood v. La Serena L. & W. Co., 113 Cal. 221, is a complete answer to this point, for it holds that a ratification, in order to be valid, must be attended with the same formalities as the authorization. As this was the case of a note and mortgage held invalid because unauthorized by the directors, it is exactly in point here for the contract to create a mortgage being required to be in writing the ratification of it must, under the case cited, have been in writing also.

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## IV.

### THERE IS NO PROOF THAT PLAINTIFF HAS BEEN DAMAGED IN ANY SUM OF MONEY WHATSOEVER.

It has been pointed out that the promise alleged in the complaint is not one to pay a certain sum of money, to be delivered in bonds. Then it might be claimed that the failure to deliver the bonds would give rise to a cause of action for the re-

covery of the money. The obligation here alleged is to deliver personal property, but in answer to the question what personal property was to be delivered, it can only be said that its nature, extent and character is not specified with precision, but with the utmost vagueness. Within the loose terms of the allegations of the complaint, the court might make a dozen surmises in this respect which might with equal reason range in kind from the most worthless security to one of the first class. The plaintiff has alleged that he was promised the delivery of something, but since the terms of the alleged agreement are so vague it is impossible to ascertain what he was promised, if anything, it is also impossible to know its value, if any it had, and the resulting damage to plaintiff for its nondelivery.

In conclusion, the plaintiff is not without a remedy here; but his remedy is the same remedy of which R. G. Hanford could avail himself were he suing. It is a plain one. In those instances where a corporation has received a consideration from a third person, but has not made the alleged promise or where for some reason the promise is void, the law relegates the injured party to an action on a quantum meruit wherein he may establish his rights. Thus, in the case of Curtin v. Salmon River, etc., 130 Cal. 345, it is noted that

> "whether defendant would be estopped from contesting the claim of the plaintiff to recover the moneys advanced to it by him is not involved herein."

The court rendered its decision there, as we ask it here to render its decision, holding that the action could not be maintained to recover damages for the breach of the promise alleged because the defendant had never promised. So in Smith v. Pacific Vinegar and Pickle Works, 145 Cal. 352, a contract formally entered into by the corporation with its president was held void by reason of the trust relation existing between the corporation and its president. The court there noted again that while the action of special assumpsit could not be maintained, the party parting with the consideration might bring an action against the corporation on quantum meruit to recover back the consideration he parted with.

So, in this case, whatever decision the court makes, we are ready to concede should be made without prejudice to any claim on behalf of Mr. Hanford, or any of the persons to whom he has disposed of the certificates, whether for value or by way of gift, to recover in general assumpsit the value of the consideration which they have parted with to the company. But they cannot recover damages against the company for breach of a special contract which the company never made.

Dated, San Francisco,
April 25, 1921.

Respectfully submitted,

R. P. Henshall,
*Attorney for Plaintiffs in Error.*

## Appendix

**IT WOULD APPEAR AS IF THE PROMISE ALLEGED WAS SECURED BY A CERTAIN MORTGAGE LIEN ON CERTAIN PROPERTY, AND IN CONSEQUENCE THE PLAINTIFF IS PROHIBITED FROM BRINGING THE PRESENT ACTION BY SECTION 726, CODE OF CIVIL PROCEDURE.**

In the main brief we have inadvertently neglected to direct the attention of the Court to two cases growing out of the same series of transactions as the case at bar. It is only fair to the Court that these cases should be before it. They are Beal v. Smith et al., 31 C. A. D. 649, and Beal v. The United Properties Company of California et al., 31 C. A. D. 656. In the last mentioned case Judge Nourse made the following statement:

> "There is another phase of the case which has been purposely omitted from the foregoing discussion because it is not presented in any of the voluminous briefs which have been filed on this appeal, and that is that plaintiff, without seeking specific performance, could have treated the oral contract as a direct obligation to pay money, sued on it as such, and had his lien to aid in enforcing the judgment. (Marshall v. Ferguson, 23 Cal. 65, 69; Cummings v. Dudley, 60 Cal. 383, 385; Beckwith v. Sheldon, 168 Cal. 742, 746.) And 'where a party agrees to give a mortgage or lien on property, or imperfectly attempts to execute such mortgage or lien, upon a valuable consideration received, a court of equity, upon a proper showing, will create a specific lien on the property intended to be hypothecated, and enforce the same'. (Beckwith

> v. Sheldon, supra, 747). But equity will grant such relief only as incidental to the enforcement of the original obligation. 'A lien is extinguished by the lapse of the time within which * * * an action can be brought upon the principal obligation.' (Civil Code, sec. 2911.) Thus, where the principal obligation is unenforceable because barred by the statute of limitations and the facts alleged do not support the conclusion that a resulting trust has arisen, equity cannot declare or enforce a lien. The principal obligation was the oral contract for the exchange of the securities, action upon which was barred in two years after it accrued, and this being so, whatever right plaintiff had to an equitable lien growing out of the oral contract was lost before this action was commenced. (San Jose etc. Bank v. Bank of Madera, 144 Cal. 574, 577; Newhall v. Sherman, Clay & Co., 124 Cal. 509, 512.)"

In the case at bar the alleged contract is in writing, but we are unable to conceive why the above reasoning should not with equal force lead to the conclusion that the present action should have been one to foreclose an equitable lien.

Such an action is not one of specific enforcement of a contract to create a certain, specific mortgage, and it is not necessary to apply to it, nor is it the law to apply to it, the stringent rules of certainty peculiar to the law of specific enforcement, where the purpose is to set in operation a contract with its terms, conditions and covenants in all their details. The lien is simply for the purpose of doing equity, and is described sufficiently for the purpose of fore-

closure where the property to which it attaches is clearly pointed out.

11 Am. & Eng. Ency. of Law, p. 143 and note 3;
Love v. Sierra etc., 32 Cal. 639, 654;
Beckwith v. Sheldon, 168 Cal. 746, 747;
3 Pomeroy's Equity, Secs. 1234, 1235.

From the complaint it would seem evident that the security of a first mortgage, or of a trust deed of that nature, was intended; that such a deed was in preparation on January 1, 1911, and that the bonds were to be issued under it; it is alleged that payment of the principal and interest of the bonds was demanded, and it does not appear but that there is in existence an instrument which may serve the purpose of identifying the property burdened with the lien. It is true that the statement is only that the deed of trust was in preparation, but, since the instrument alleged promises a mortgage security there remains only the necessity of identifying the property to which the lien attaches, and for that purpose it is not necessary that the deed of trust be executed; it would be sufficient if it were only such a general statement as "all the property", or if it were only a schedule identifying certain property, though apart from the promise of a mortgage it might have no legal effect whatsoever. The plaintiff has alleged sufficient facts to raise grave doubt that he is suing on an unsecured promise. That the trust deed stated to be in preparation may be referred to is settled by the familiar rule

that evidence of extrinsic facts is allowed to identify the description of property in a written contract. (Joyce v. Tomasini, 168 Cal. 240.)

As a consequence of this situation, it would appear that the plaintiff's own complaint points him to an exclusive remedy under Section 726, Code of Civil Procedure.

The right to a personal action to recover a debt secured by a mortgage is inhibited by Section 726, Code of Civil Procedure.

Hibernia Sav. & Loan Soc. v. Thornton, 123 Cal. 62;

Toby v. Oregon etc., 98 Cal. 494.

Dated San Francisco,
May 2, 1921.

Respectfully submitted,

R. P. HENSHALL,
*Attorney for Plaintiffs in Error.*

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Received a copy of above this.....day of May, 1921.

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*Attorneys for Defendant in Error.*

No. 3192

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

3

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, et al.,
*Plaintiffs in Error,*

vs.

MARY ELLEN KIBBE,
*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

KEYES & ERSKINE,
*Attorneys for Defendant in Error.*

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# United States Circuit Court of Appeals

**For the Ninth Circuit**

THE UNITED PROPERTIES COMPANY OF CALIFORNIA, et al.,

*Plaintiffs in Error,*

vs.

MARY ELLEN KIBBE,

*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

The statement of the case by plaintiffs in error is very meager. It consists of a synopsis of the pleadings. As far as it goes, it is not controverted. We will, however, in discussing the questions raised when we come to them, state the facts of the case more fully than they appear in the brief of plaintiffs in error.

### THERE IS NO DOUBT THAT THE COMPLAINT STATES A CAUSE OF ACTION.

The action is based upon an instrument, the most material portion of which reads as follows:

> "The United Properties Company of California, a corporation organized and existing under the laws of the State of Delaware, for value received, promises to deliver to Ira M. Condit and Mary Ellen Kibby as Joint Owners, or the Survivor of them, or order, upon the surrender of this certificate duly endorsed, thirteen of its 'First Mortgage and Collateral Trust Five Per Cent Fifty Year Sinking Fund Gold Bonds', of the denomination of One Thousand Dollars ($1000.00) each, with all interest coupons thereto attached, said bonds to be issued under and secured by the Deed of Trust in preparation dated January 1, 1911, made by said The United Properties Company of California, and to be delivered hereunder as and when the said bonds may be certified and ready for delivery."

The argument that plaintiffs in error make to support their assertion that the complaint does not state a cause of action may be divided into two phases. They first point out that no time for the delivery of the bonds is specified; they then state that the proper construction of the agreement is that the bonds were not to be delivered until prepared for delivery; they then, in effect, assert that the preparation of the bonds for delivery was a condition precedent to their liability; that they had an indefinite, perhaps interminable, time within which to prepare the bonds for delivery and that therefore the failure of the defendant in error to allege in her complaint that the bonds were ready for delivery was fatal to her cause of action. Realizing how erroneous this line of reasoning is, they

abandon it in the second phase of their argument by practically conceding that the company only had a reasonable time within which to complete the deed of trust and to prepare the bonds for delivery, and that after the expiration of this time the bonds became deliverable on demand and surrender of the certificate, and that a failure to so deliver them would amount to a breach of contract, whether or not the bonds had been prepared for delivery. To escape the force of this argument, whose truth they in effect concede, they then assert that the complaint fails to allege facts from which the court can conclude that a reasonable time for the company to prepare the bonds for delivery has elapsed.

These are the two phases of their argument on this point and it is apparent that the argument contains its own refutation. During their statement of it they make several erroneous assertions which we will briefly notice. For instance, they state that defendant in error should have alleged "that from and after a certain date an unreasonable time had elapsed and that the defendant had failed within that reasonable time to perform its obligation" (brief of plaintiffs in error, page 16). What is a reasonable or unreasonable time to perform an act is a legal conclusion to be drawn from the nature of the contract and the particular circumstances of the case. See *13 C. J. on Contracts,* Section 782, and *Greenberg v. California B. R. Co.,* 107 Cal. 667, 671, quoting *Parsons on Contracts* to the following effect:

> "If the contract specifies no time the law implies that it shall be performed within a reasonable time, and will not permit this implication to be rebutted by extrinsic testimony going to fix a definite term, because this varies the contract. What is a reasonable time is a question of law. And, if the contract specify a place in which articles shall be delivered, but not a time, this means that they are deliverable on demand."

It is not good pleading to allege legal conclusions (*12 Am. & Eng. Ency. of Practice,* 1020). Again, they assert that as the indorsements on the instrument show payment of interest up to January 1, 1913, that they "could not have been in default on January 1, 1913" (brief of plaintiffs in error, page 14). Their obligation under the certificate was to deliver bonds and not pay interest; indeed, the payment of interest on the certificate is not mentioned in it and we fail to see what bearing the payment of interest may have upon the obligation of the company under the certificate to deliver the bonds. Again, they assert that as the complaint alleges that the deed of trust was not executed "that the failure to deliver the bonds was legal" (brief of plaintiffs in error, page 17). To answer this we need only quote from another portion of their involved argument. On page 14 of their brief they state:

> "It may be conceded, of course, that the corporation could not refuse to execute the deed of trust and could not indefinitely postpone a delivery of the bonds."

The complaint is based upon the certificate we have quoted. When reduced to its simplest terms, this certificate says: The United Properties Company promises to deliver to Ira M. Condit and Mary Ellen Kibbe as joint owners thirteen one thousand dollar bonds upon surrender of this certificate. This is practically a promise to deliver at any time the certificate is surrendered, which is the same thing as a promise to deliver upon demand. Plaintiffs in error say that this is not the exact construction of the instrument, and they contend that the obligation of the company to deliver the bonds was not to be performed upon demand, but only when the company had completed its deed of trust and prepared its bonds for delivery. Even so, the company did not have an indefinite time within which to perform these acts, but only a reasonable time; and after this reasonable time had elapsed her failure to deliver the bonds upon demand and surrender of the certificate would be a breach of contract.

Section 1657 of the Civil Code provides:

> "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed."

This is a statement of an elementary rule of law. (See also *Greenberg v. California B. R. Co.*, quoted from, supra.) The plaintiffs in error practically concede its application to this case; but, as we have stated, they contend that the complaint does not

allege facts from which the court can conclude that a reasonable time for the company to prepare the bonds for delivery had elapsed before demand was made.

The complaint states that the date of the promise to deliver the bonds was February 15, 1912, and that the demand was made in September, 1915, three years and nine months after the promise was made. The action was not commenced until December, 1915, almost three months after the demand was made and almost four years after the promise. The time that has elapsed is therefore shown in detail. Furthermore, the instrument sued on says that the deed of trust given to secure the bonds was in preparation on January 1, 1911. So it appears from the complaint that the company was preparing five years before the commencement of the action to issue these bonds. Upon this last fact alone the court could predicate its conclusion that a reasonable time had elapsed. The complaint goes further—it states that the bonds were never executed, and that upon the demand made three years and nine months from the date of the instrument that their delivery was absolutely and unconditionally refused.

In *13 C. J. on Contracts,* Section 782, the text-writer says:

> "The question as to what is a reasonable time for the performance of a contract fixing no time for performance depends on the nature of the contract and the particular circum-

> stances. * * * Perhaps as accurate a definition of reasonable time as may be given is that it is such time as is necessary conveniently to do what the contract requires should be done."

The nature of the acts to be performed by the company in this case was the completion of the deed of trust, which the agreement recites was dated January 1, 1911, and was in the course of preparation, and the preparation and delivery of the bonds. What is the time necessary to conveniently perform these acts? This court knows how long it takes to comply with the provisions of the law concerning the execution, acknowledgment, recording, issuance and delivery of the bonds and deed of trust. Six months is the maximum length of time it should require. As the complaint shows that three years and nine months had elapsed before demand was made for the bonds and that at the time the demand was made that the deed of trust had not been prepared nor the bonds executed, it is absurd for the plaintiffs in error to contend that the complaint does not show the expiration of an unreasonable length of time for the performance of these acts.

All that is necessary for the complaint to show and all that it can show without pleading conclusions of law is the nature of the acts to be performed and the time which has elapsed; from these elements the law concludes whether a reasonable time has expired. The complaint in this case shows both these elements and it is therefore above the criticism urged against it. For cases in which the court

has concluded that a reasonable time has elapsed when there has appeared in the complaint only a statement of the time that has expired, see *Hannan v. McNickle,* 82 Cal. 122; *Fowler v. Sutherland,* 68 Cal. 416, and *Nance v. Pena,* 41 Cal. 686.

We have assumed that the construction that plaintiffs in error placed upon the instrument is correct, and that the company had a reasonable time after the date of the instrument within which to complete the deed of trust and prepare the bonds for delivery. An analysis of the certificate will show that this is not its proper construction. The certificate shows, first, a promise to give the bonds upon surrender of the certificate; second, the bonds are to be secured by a deed of trust in preparation made by The United Properties Company and "to be delivered hereunder as and when the bonds may be certified, and ready for delivery". The words "as and when, etc.", refer obviously to the delivery of the deed of trust—that is the plain and grammatical construction of the sentence. It appears, therefore, that the bonds were to be delivered upon the surrender of the certificate, that is, upon demand, and that the company did not have a reasonable time after the date of the certificate to prepare the bonds for delivery. As we have shown, however, that much more than a reasonable time to perform this act had elapsed, when the demand was made, this question of construction becomes immaterial.

The gravamen of the complaint is that the company agreed to deliver the bonds upon demand or

within a reasonable time after the date of the certificate (it makes no difference which construction is adopted); that after the expiration of a totally unreasonable length of time that the certificate was surrendered to it and demand made for the bonds; and that this demand was unconditionally refused. There can be no question that a cause of action was stated.

In support of their assignment of error, that the complaint does not state a cause of action, the plaintiffs in error make the point that the contract alleged is so uncertain that it cannot be made the basis of an action. We do not think that plaintiffs in error are serious in advancing this argument, for in the appendix to their brief they assert that although the contract is not sufficiently specific to be specifically enforced, yet it is sufficiently certain to create an equitable lien and that therefore a recovery cannot be had without foreclosing the lien. The plaintiffs in error are unable to sustain their contention that the certificate created an equitable lien; but what they say in the course of their argument on this point is a sufficient answer to their contention that the contract expressed in the certificate is so uncertain that it cannot be enforced.

There is nothing uncertain or ambiguous in the contract upon which suit is brought. It is an agreement to deliver thirteen first mortgage bonds whose denomination, rate of interest and date of

maturity are specified. The company has breached this contract by failing to deliver the bonds and defendant in error is seeking *not specific performance of the contract,* but damages for its breach. As the law presumes, in the absence of evidence to the contrary, that the damages suffered by a refusal to deliver bonds under a contract of this kind is the par value of the bonds, there is obviously no such uncertainty in this contract as to accomplish its destruction. Contracts of an identical nature have been enforced by the courts. In *Henry v. North American Railroad Construction Co.,* 158 Fed. 79, an action was brought on a contract of employment which provided for payment in cash and by "20 of the first mortgage 5% gold bonds of the Shawton Company, each for the principal sum of $1000.00". Damages for failure to deliver the bonds were allowed by the Circuit Court of the Eighth Circuit in the Henry case without question.

The plaintiffs in error did not raise this point of uncertainty in the contract in the trial court and have not assigned the point as error; hence the only assignment of error under which they can make the point is their assignment that the complaint does not state facts sufficient to constitute a cause of action. It is quite clear that the terms of this contract set out in the complaint are sufficiently certain to make the complaint impervious to general demurrer. If the plaintiffs in error were uncertain as to what the contract sued on meant their remedy was by motion to make more certain and not by

suggesting the point for the first time in these proceedings on writ of error.

Furthermore, the rules enunciated by the author of Contracts in *6 R. C. L.* page 645, entirely destroy any argument which the plaintiffs might have made either on demurrer or at the trial. These rules are:

> "However, the law does not favor, but leans against the destruction of contracts because of uncertainty. Therefore, the courts will, if possible, so construe the contracts as to carry into effect the reasonable intention of the parties if that can be ascertained. Though there are some formal imperfections in a written contract, still it is sufficient if it contains matter which will enable the court to ascertain the terms and conditions on which the parties intended to bind themselves. The maxim *Id certum est, quod certum reddi potest,* applies. * * * Also, an ambiguity or uncertainty may be removed by the acts, conduct, declarations, or agreements of the parties. In other words, an uncertain agreement may be so supplemented by subsequent acts, agreements, or declarations of the parties as to make it certain and enforceable. The acts of practical construction placed upon a contract by the parties thereto are binding, and may be resorted to to relieve it from doubt and uncertainty. This is simply an extension of the maxim referred to."

See also *McIntyre Lumber etc. Co. v. Jackson Lumber Co.,* 51 So. (Ala.) 767; *Witty v. Michigan Mutual Life Ins. Co.,* 24 N. E. (Ind.) 141; *Northern Central Ry. Co. v. Walworth,* 44 Atl. (Pa.) 253, and *Daily v. Minnick,* 91 N. W. (Ia.) 913.

The uncertainties of which the plaintiffs in error principally complain are those respecting the terms of the deed of trust. We do not understand how the terms of the deed of trust can effect our right to recover damages for the company's failure to deliver bonds. Yet let us assume these terms are material. The certificate recites that the deed of trust is in preparation and is dated January 1, 1911. The certificate upon which suit is brought is dated February 15, 1912. If an uncertainty did exist as to the terms of the deed of trust, and it was essential to the cause of action to establish these terms, here was an uncertainty which could be made certain by proof. Furthermore, resort could be had to the agreements between Hanford and the company, their acts, declaration and conduct respecting these certificates and the practical construction placed by them upon the certificates to dispell any uncertainty which the plaintiffs in error claim exists in the instrument.

The conclusion is that the point, that the contract alleged is so uncertain that it cannot form a basis for an action for damages is not well taken. The cases cited by plaintiffs in error in support of this proposition are not in point and do not militate against this conclusion.

FACTS OF CASE RELATIVE TO EXECUTION OF CERTIFICATE REVIEWED.

The next points raised by the plaintiffs in error are that the execution of the certificate was unauthorized in the first instance and was, therefore, not the contract of the company and that there was never a subsequent ratification of the execution of this certificate which would render it enforceable. A proper consideration of these questions requires a knowledge of the facts of the case.

The United Properties Company was organized under the laws of Delaware (Trans. p. 109). It was formed and intended to be a holding company. It purposed to acquire the capital stock of other corporations (Trans. pp. 63 and 112). R. G. Hanford, W. S. Tevis and Frank M. Smith were its founders. They intended to transfer to it certain shares of stock of other corporations which they held. After the formation of the company and in pursuance of this plan, at a meeting of the directors of the company, Mr. R. G. Hanford made in writing to the directors two proposals. The first is referred to in all the proceedings of the company as Offer No. 1—the second is referred to as Offer No. 2.

In the first Offer Mr. Hanford agreed to deliver to the defendant, The United Properties Company, certain shares of the capital stock of the corporations named therein. In exchange for all of said shares of stock and as a consideration for the delivery thereof to The United Properties Company,

Hanford requested the delivery to him of the securities of The United Properties Company (Trans. pp. 64-71). This offer contained the following provision (Trans. pp. 70-71):

> "If this offer is accepted by you, the exchange of stock herein contemplated shall be made and consummated within 30 days from date of such acceptance.
>
> If your company is unable within said time to issue and deliver to me the permanent First Mortgage Bonds or Convertible Debenture Bonds of your company herein above mentioned, I agree to accept from you in lieu thereof certificates for such bonds authorized and issued by you, which certificates shall provide that the holders thereof shall be entitled to receive from you the said First Mortgage Bonds and Convertible Debenture Bonds as soon as same are executed, issued and ready for delivery, together with all interest coupons attached to said First Mortgage Bonds entitling the holder thereof to interest at the rate of 5% per annum from and after the first day of January, 1911.
>
> Yours truly,
> (Signed) R. G. HANFORD."

In Offer No. 2 Mr. Hanford agreed to deliver to The United Properties Company certain shares of the common stock and certain shares of the preferred stock of the San Francisco, Oakland and San Jose Consolidated Railway, hereinafter referred to as the "Key Route", and of the Oakland Traction Company. In exchange for such shares of common and preferred stock, and as the consideration for the delivery thereof to The United

Properties Company, Hanford requested the delivery to him of certain securities of The United Properties Company. By the terms of Offer No. 2 Hanford did not ask for any first mortgage bonds nor for any certificates in lieu of bonds (Trans. pp. 71-80).

The court's attention is respectfully called to the fact that in Offer No. 2 the said Hanford did not require any first mortgage bonds as he did in Offer No. 1. As no first mortgage bonds were required by Hanford in Offer No. 2, of course nothing was said by Hanford in Offer No. 2 about accepting certificates in place of bonds.

At the meeting of February 24, 1911, at which the offers were made, Offer No. 1 was accepted by the following resolution (Trans. p. 65):

> "Be It Resolved: That the stocks offered by Mr. R. G. Hanford in his communication, a copy whereof is hereafter spread upon these minutes, are of the value of not less than $145,-346,730.00."
>
> Further resolved: "That the said offer be and the same is hereby accepted and that the proper officers of this company be and they are hereby authorized and directed to issue such shares of stock, bonds and convertible debenture bonds of this company and to do all such other acts and things as may be necessary to affect the said exchange."
>
> Further resolved: "That a copy of said communication of said R. G. Hanford be spread upon the minutes of this meeting."

Offer No. 2 was accepted by another, distinct resolution in practically the same language (Trans. p. 72).

Within thirty days thereafter Mr. Hanford delivered to The United Properties Company the shares of stock of the companies which he proposed to deliver in Offer No. 1 and received from The United Properties Company the securities which he required by Offer No. 1; included in these securities were certificates for 10,411 First Mortgage Bonds of $1000.00 each (Trans. pp. 98-99).

No first mortgage bonds were ever issued by The United Properties Company; there was issued, however, to Hanford 10,411 certificates for bonds (Trans. p. 99). This was the total amount of certificates issued. Thereafter these certificates issued to Hanford were transferred by him to different persons. These persons surrendered these certificates to The United Properties Company and received others made out to them instead of to R. G. Hanford, the original payee. Thereafter when the certificates thus issued was transferred by the payee therein named it was surrendered by the transferee to The United Properties Company and a new certificate issued in the name of the transferee. The certificate sued upon in this case thus found its way into the hands of the defendant in error (Trans. pp. 113-118).

From the time that the said certificates for 10,411 bonds were issued to R. G. Hanford during the

years 1911, 1912 and 1913 there was kept in the office of the company a certificate book containing documents numbered from 1 to 1500, inclusive, of the same form, tenor and containing the same provisions, terms and covenants contained in the certificates sued on, except that the name of the holder, the amount thereof and the date thereof were left blank and there were no signatures thereon and the seal of the corporation was not affixed thereto. Attached to each of these certificates was a stub. When a certificate was issued, the name of the holder, the number of the certificate, the amount thereof and the date of issuance was written on the stub and then the certificate was detached from the stub and given to the holder after having been signed by the officers of the corporation and after having the seal affixed. When a certificate so issued was surrendered it was again affixed to its proper stub, and the officers receiving the same noted on the stub that the certificate had been returned and the number of the certificate or certificates which were issued in lieu thereof. Certificates from number 1 to 1500 for various numbers of bonds and in various amounts were issued, surrendered and reissued (Trans. p. 119).

These transactions took place during the years 1911, 1912 and 1913. All of the directors knew that these transactions were taking place; all of the directors had at various times received certain of

during the last mentioned period held a majority in number of the shares of the capital stock issued by the said corporation (Trans. pp. 119-120).

No resolution was ever at any time adopted disaffirming or disapproving of these transactions and no measures were ever taken by the company or by its board of directors to prevent these transactions (Trans. p. 100).

Interest was paid on the indebtedness evidenced by the certificates issued to Hanford or by those reissued in the place of those issued to Hanford, including the one herein sued upon. This interest was paid in semi-annual installments at the rate of five per cent per annum for the following periods:

From January 1, 1911 to July 1, 1911,
From July 1, 1911, to January 1, 1912,
From January 1, 1912, to July 1, 1912, and
From July 1, 1912, to January 1, 1913.

Part of the first installment of interest was paid on July 1, 1911, the balance thereof on November 18, 1911, the second installment on the 2nd of January, 1912, the third installment on the 6th of July, 1912, and the fourth installment on January 9, 1913 (Trans. pp. 118-119).

This interest was paid by The United Properties Company. All of the directors knew of the payment of this interest. No resolution was ever adopted by the board of directors disaffirming or diapproving of the payment of the said interest. No measure was ever taken by the directors or by

the company to prevent the payment of this interest (Trans. p. 100).

On the 5th of December, 1911, almost a year after these certificates had been issued to R. G. Hanford, and after one installment of interest had been paid, a meeting of the stockholders of The United Properties Company took place. At this meeting 625,378,202 shares of the stock of the corporation were present either in person or by proxy. At that time the total amount of the stock of the corporation issued was 707,380,942 shares; 502,000 shares of stock were present at the said meeting by W. S. Tevis. The stockholders present at that meeting knew of the payment of interest, and of the issuance of the certificates to Hanford. Upon motion duly made and seconded and unanimously carried, the stockholders on the last mentioned date adopted the following resolution (Trans. pp. 101- 109):

> "Resolved: That all the acts, contracts and proceedings of the officers, directors and committees of this corporation since the first meeting of the incorporators of this corporation, which meeting was held in the City of Wilmington, State of Delaware, on the 31st day of December, 1910, to this date, be and they are hereby in all respects ratified, confirmed and approved and declared to be the acts and deeds of this corporation" (Trans. p. 108).

These are the facts upon which a determination of the points raised by the plaintiffs in error in their brief must be determined.

THERE CAN BE NO QUESTION THAT THE ISSUANCE OF THE CERTIFICATE SUED ON WAS AUTHORIZED BY THE COMPANY IN THE FIRST INSTANCE; THAT IT WAS ITS CONTRACT AND ENFORCEABLE AS SUCH.

The reasons upon which the plaintiffs in error base their claim that the contract sued on was never made by the company are extremely technical and abstruse; and in the light of the facts, as they have been recited, this claim appears entirely groundless. The reasons advanced are, first, that by his Offer No. 1 Hanford had offered to accept certificates only after the corporation had set in motion the machinery for the creation of a bonded indebtedness, and that as no step had been taken to create a bonded indebtedness that the certificates issued were not those referred to in Hanford's offer; and that by the resolution accepting the Hanford Offer No. 1 the corporation was authorized to issue certificates for bonds only after the creation of a bonded indebtedness, and as no bonded indebtedness had been created the issuance of the certificates was therefore unauthorized.

There is not a circumstance in the case that justifies the plaintiffs in error in making either of these assertions. We have already quoted the Hanford Offer No. 1. There is not a word in it respecting the creation of a bonded indebtedness. The plaintiffs in error would lead the court to believe that the terms of this offer made its acceptance conditional upon the creation by the corporation of a bonded indebtedness. They quote that portion of

the offer in which Hanford agrees to accept in lieu of the bonds "certificates for such bonds authorized and issued by you" (brief of plaintiffs in error, page 22). The word "authorized" which is italicized by them, they apparently construe as applying to the bonds. This is a palpably erroneous construction. What Hanford was offering to accept in lieu of the bonds were certificates to be authorized by the corporation. By the language of his offer he was asking that the certificates, and not the bonds, be authorized. This offer was accepted by the resolution we have quoted, which does not refer to the creation of a bonded indebtedness, but which in effect authorizes the corporation to issue the certificates. Thereafter this contract was consummated by Hanford delivering to the company the securities which he had offered to deliver to it and by the company delivering to Hanford its securities, including the certificates for bonds, which Hanford had agreed to accept in the exchange. If there is any doubt whether the certificates which Hanford had offered to accept were those which he received, it should be dispelled by the practical construction which was thus placed upon the agreement by the parties to it. In *Kennedy v. Lee*, 147 Cal. 603, the court said:

> "The construction which the parties give to a contract prevails where the language used will reasonably allow such construction."

If there is any question as to the true construction this rule is particularly applicable to this case.

The Hanford Offer No. 1 and the resolution accepting it must be read together. We have seen that the offer called for certificates in lieu of bonds and that its acceptance was in no wise made conditional upon the creation of a bonded indebtedness. Hence the resolution accepting this offer and, in effect, authorizing the issuance of the certificates, authorized the issuance of the certificates without regard to whether steps had been taken to create a bonded indebtedness.

The plaintiffs in error say that the company could not promise to create a bonded indebtedness until it had taken steps to create it. We cannot see why one cannot promise to give a bond before steps have been taken to create it, as well as after such steps have been taken. There is no difference between such a promise before and such a promise after creation of a bond issue is commenced. Until the creation is completed there is no bonded indebtedness created and there is therefore no more force in one promise than in the other. We submit that there is nothing in Offer No. 1 or the resolution accepting it that limits the certificates to the promise of a bond to be issued under bonded indebtedness in the process of creation.

The company was formed as a holding company. It had no assets until it received those Hanford offered. It could not get those except by exchange for its stock and bonds or certificates. If it was intended that the bonded indebtedness should be

in the process of creation before the company issued the certificates the company would have been required to take steps to create a bonded indebtedness without any property at all with which to create it. We submit that defendant's contention has not been sustained and that the issuance of these certificates was authorized by the resolution accepting Offer No. 1.

The conclusion is that the company through its board of directors authorized the issuance of the certificate upon which suit is brought, that it was its contract, and that it must be liable for its breach.

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**WHEN ALL THE ERRONEOUS ASSUMPTIONS OF PLAINTIFFS IN ERROR ARE ACCEPTED AS CORRECT HIS ARGUMENT MUST FAIL AS CORPORATION RATIFIED AND IS ESTOPPED TO DENY EXECUTION OF CERTIFICATE.**

Apparently unsatisfied with their preceding argument, plaintiffs in error introduce this phase of their case by advancing another reason why the resolution accepting the Hanford Offer No. 1 did not authorize the directors to issue the certificates. They say that Hanford's Offers No. 1 and 2 were made by him as a general plan between himself and F. M. Smith for the creation of the corporation; that Smith failed to deliver all the securities which he had agreed to deliver to the corporation; and that the corporation's acceptance of the Hanford Offer No. 1 was a conditional acceptance,

which was to become absolute only when Smith complied with his agreement, and that therefore the resolution accepting the Hanford Offer No. 1 cannot be construed as an authorization by the directors to issue the certificates.

We must characterize this argument of plaintiffs in error as equally erroneous as the other arguments made by them to the same point. Mr. Hanford made two offers. There is nothing in the evidence to show that these offers were made as a part of a general scheme. Neither offer refers to the other and as far as the evidence goes, they are complete, separate and distinct (see minutes of directors' meeting of February 24, 1911, Trans. pp. 64-80, for both offers and both resolutions of acceptance). At the bottom of page 27 of their brief and at the top of page 28 the plaintiffs in error quote part of Hanford's Offer No. 1 and therein assert that the stock referred to was never delivered to the company. This is absolutely incorrect. In Offer No. 1 Hanford agreed to deliver certain shares of stocks in ten companies. He was to receive, among other things, for these shares of stock 10,411 certificates. He delivered the shares of stock to the company; it accepted these shares of stock and has held them ever since, and it delivered to him the 10,411 certificates from which the one herein sued upon came. According to the evidence, Offer No. 1 was completely complied with by both parties. The acceptance and retention by

the company of the benefits of the transaction was proved by evidence absolutely uncontradicted (Trans. pp. 98-99).

It is obvious that any agreement between Smith and Hanford before the creation of the corporation and to which the corporation was not a party could have absolutely no effect upon the contract entered into between the corporation and Hanford, which is evidenced by Offer No. 1 and the resolution accepting it.

Although it is quite immaterial in this case, the evidence shows that Hanford made Offer No. 2 on behalf of Smith, and that Smith delivered, not all, but most of the securities which he had agreed to deliver under the terms of Offer No. 2 (Trans. pp. 140 and 142). The corporation retained all these securities and never repudiated the contract consummated by its acceptance of Offer No. 2. It appears, therefore, that it is bound by this contract as well as by the contract consummated by its acceptance of Offer No. 1. Under no conceivable theory, therefore, can it make Smith's failure to completely comply with Offer No. 2 an excuse for its failure to comply with the contract created by its acceptance of Offer No. 1.

It follows that the last argument which plaintiffs in error make to show that the resolution accepting Offer No. 1 did not authorize the issuance of the certificates must utterly fail and that this express, formal authorization must be conceded.

Proceeding upon the assumption that they have established their point that the execution of the certificate sued on was never authorized in the first instance, an argument which we have shown to be utterly groundless, plaintiffs in error then attempted to show that the execution of the contract was never ratified by the company. That there was a ratification and that the company is estopped to deny that there was a ratification cannot be doubted.

We have already recited the facts surrounding this transaction. From these it is apparent that the issuance of the certificates for bonds was ratified by the following unequivocal acts, any one of which was a sufficient ratification in itself.

First, with knowledge of all the facts, the company retained all the securities given it in exchange for the securities, including the certificates for bonds, which it had delivered to Hanford, and it has made no effort to rescind the transaction or restore the consideration.

> "Retention of the consideration of a transaction and acceptance of its benefits is a ratification."
>
> *Curtin v. Salmon River Co.,* 141 Cal. 308;
>
> *Phillips v. Sanger,* 130 Cal. 431;
>
> *Dickenson v. Zubiat Mining Co.,* 11 Cal. App. 664;
>
> *Illinois Trust and Savings Bank v. Pacific Railroad Co.,* 117 Cal. 332.

Second, the officers of the company openly in the office of the company, with the knowledge of the directors and stockholders publicly and continuously for a period of three years and more issued, accepted the surrender of and reissued these certificates in the same manner as they would stock certificates or registered bonds. The allowance of an open public and continuous exercise of authority is a ratification of it.

*2 Thompson on Corporations,* Section 1427;
*10 Cyc.* pages 937 and 1081.

Third, the directors and stockholders knew that the certificates had been issued to Hanford, that they were being transferred to others, surrendered and reissued, that there were books kept for that purpose in the office of the company which constituted part of the office records. This course of conduct on the part of the officers continued for three years, and yet neither the directors or stockholders, during that period or at all, ever disaffirmed or disapproved or took any measures necessary to prevent these transactions. The stockholders and directors acquiesced in the acts of their officers. Such acquiescence and failure to disaffirm within a reasonable time constitutes a ratification.

*Brown v. Crown Gold Mining Company,* 89 Pac. 86 (Cal.);
*Illinois Trust and Savings Bank v. Pacific Railroad Co.,* 117 Cal. 332;

*Curtin v. Salmon River Co.*, 141 Cal. 308;
*Riley v. Loma Vista Ranch Co.*, 1 Cal. App. 491;
*Clark and Marshall on Private Corporations*, Vol. 3, page 2188.

The last mentioned authority states the rule as follows:

> "Ratification may also be implied, or the corporation be held estopped to deny ratification, from acquiescence on the part of the corporation. When the officers or agents of a corporation exceed their powers in entering into contracts or doing other acts, the corporation, when it has knowledge thereof, must promptly disaffirm the contract or act, and not allow the other party or third persons to act in the belief that it was authorized or has been ratified. If it acquiesces, with knowledge of the facts, or fails to disaffirm, a ratification will be implied, or else it will be estopped to deny a ratification."

Fourth. The company paid the interest on the indebtedness evidenced by these certificates for three years. The directors and stockholders at all times knew that this interest was being paid, they knew also that if a certificate was surrendered and a new one issued that interest was paid to the holder of the new one. The payment of interest alone should constitute ratification of the issuance of these certificates.

Fifth. The stockholders, with knowledge of all these facts and all the business of the corporation, adopted a resolution approving and ratifying

all the acts of the officers and directors. There can be no question that this resolution alone was sufficient to ratify all the acts of the directors and officers of the corporation, including the issuance of the certificate sued on. It is needless to cite authorities holding that such a resolution is a sufficient ratification in itself, but we respectfully call the court's attention to the case of *Riley v. Loma Vista Ranch Co.,* 1 Cal. App. 491, in which a similar resolution was adopted.

The plaintiffs in error seek to avoid the effect of this ratification and estoppel, which is so overwhelmingly established, by asserting that the certificate was a contract to create a mortgage and that, therefore, it should be executed with the same formalities as a mortgage. They cite no authority to support this claim; nor do they seek to support it by any reasoning; but they content themselves with the bare assertion of it. Their assumption is erroneous.

In the first place the certificate sued on was not a mortgage but an unsecured promise; it creates no lien upon anything. It does not purport by its terms to hypothecate or pledge anything as security for its performance. It is just like any number of unsecured agreements. The distinction between an unsecured promise and a mortgage is very obvious. A mortgage creates a lien which can be enforced against the property of the company in favor of the holder thereof in preference to the claims of gen-

eral creditors and of stockholders, while the holder of an unsecured promise can only collect from the corporation his pro rata with the other general creditors in case the assets of the corporation are not sufficient to pay all in full.

We are unable to conceive, therefore, why the certificate should be executed with the same formalities as a mortgage.

Assuming, however, that such formalities should have been observed in its execution, the plaintiffs in error do not state the formalities which the execution of a mortgage requires and which they claim should have been observed in the execution of the certificate. As we have shown, the issuance of the original certificates to Hanford was authorized by the resolution of the board of directors accepting the Hanford offer No. 1; and the certificate sued on is signed by the vice-president and assistant treasurer of the company and has the corporate seal attached. Even though the certificate should have been executed with the same formalities as a mortgage, no additional acts could have been required to lend it validity.

This part of the argument of plaintiffs in error is apparently based upon the assumption that the execution of the certificates were not authorized by the resolution of the board of directors. Their technical and abstruse arguments totally failed to establish a lack of authorization. Despite this, however, they proceed on the assumption that the

board of directors never authorized the issuance of the certificates, and after making the additional assumption, which is also baseless, that the certificates should have been executed with the same formalities as a mortgage, they cite some California cases to the effect that the execution of a mortgage by a corporation should be authorized by the formal act of the directors. This is doubtless the law respecting mortgages; and a mortgage not so authorized cannot be enforced against the corporation unless the corporation has ratified it or is estopped to deny it. In California, because of a peculiar provision of our code, a distinction is drawn between a ratification of an act by a corporation and its estoppel to deny the act (*Blood v. Serena Land & Water Co.*, 113 Cal. 221). It is a distinction without a difference, and is peculiar to the law of California and would not be recognized by the federal courts, who would follow the rule respecting ratification by a corporation which has been practically universally established. However, there can be no question in this case that the corporation both ratified the execution of the certificates and that it is estopped to deny their execution. Therefore, even assuming that the groundless assumptions of the plaintiffs in error are correct, that is, that the issuance of the certificates was never authorized by a formal act of the board of directors, and that the certificates should have been executed with the same formalities as a mortgage, and that these formalities were not observed, even so their argument must

fail, as the corporation both ratified the execution of these certificates and is estopped to deny their execution.

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**THE AMOUNT OF DAMAGES SUFFERED BY DEFENDANT IN ERROR BY REASON OF BREACH OF CONTRACT TO DELIVER BONDS SUFFICIENTLY ESTABLISHED.**

The next point which plaintiffs in error raise is that there is no proof that defendant in error has been damaged. The complaint alleges that for failure to deliver the bonds in accordance with the promise contained in the certificates, the plaintiffs were damaged in a sum equal to the face value of the bonds. Plaintiffs offered in evidence the certificates and it was admitted that the bonds had never been delivered. The damage for the breach to deliver the bonds is presumptively the amount expressed upon the face of the bonds.

> *Henry v. North American Railroad Construction Co.,* 158 Fed. 80.

In that case the description of the bonds which the defendant had agreed to deliver was almost identical with the description of the bonds here. The defendant had agreed to deliver "twenty of the first mortgage five per cent gold bonds of the Shawnee Traction Company, each for the principal sum of $1,000.00", and had failed to deliver part of them. The court said:

> "It being conceded that the plaintiff had fully performed its undertaking, but the de-

fendant had failed to keep and perform his contract by delivering to the plaintiff the $6,500.00, face value of bonds, in the action for breach of contract, the essential question is: What is the measure of damages? The answer the law makes is: The value of the bonds at the time they should have been delivered under the contract. Prima facie the amount expressed upon the face of the bonds is the value thereof (citing authorities).

When, therefore, the plaintiff had shown that the defendant had failed to deliver the bonds in question when they should have been delivered, it had made out a prima facie case entitling it to judgment for the face value of the bonds, with interest from date of default. The defendant then assumed the laboring oar to show, if he could, that the actual value was less."

The defendant made no showing that the amount of damage suffered by the plaintiffs is less than the face value of the bonds which they agreed to deliver. According to the foregoing authority and the authorities therein cited the plaintiffs have established that they have been damaged in the amount of the face value of the bonds which the company agreed to deliver.

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**DEFENDANT IN ERROR WAS NOT PROHIBITED FROM BRINGING THE PRESENT ACTION BY SECTION 726 CODE OF CIVIL PROCEDURE.**

In the appendix of their brief, which plaintiffs in error have filed, a new point is raised which was not presented by them to the District Court and which has not been assigned as error. It would

seem, therefore, that this court is precluded by its rules from considering the point. "Appellate courts are not the proper forum to discuss new points" (*Walton v. Wild Goose Mining and Trading Co.,* 123 Fed. 209, and cases cited, decided by Circuit Court of Ninth Circuit). Plaintiffs in error might contend that they have the right to discuss the point under their assignment of error that the complaint does not state facts sufficient to constitute a cause of action. This they cannot do, however. Even if the certificate had been secured by a mortgage the complaint, as it is written, would not be demurrable for that reason. In *Hibernia Savings & Loan Society v. Thornton,* 117 Cal. 481, the action was on a promissory note to recover a personal judgment. The note, which was set out in the complaint, recited that it was secured by a mortgage. The court held that the complaint stated a cause of action, even though it asked for a personal judgment and not for the foreclosure of the mortgage, and that therefore a judgment on the pleadings was improperly granted. Plaintiffs in error state that the facts alleged in the complaint "raised grave doubt" whether the action was brought on an unsecured promise; but under the authority of the case just cited such grave doubt, if it did exist, would not render the complaint amenable to general demurrer, even though the cause of action stated therein was within the purview of Section 726, which it is not. The conclusion is that the point under discussion is a new point raised for the

first time in this court and not assigned as error. For these reasons we would be justified in refusing to consider it.

However, slight consideration of the point would show that it is not well taken. The new argument is that the certificate created an equitable lien upon property which is not identified by it, and that under Section 726 of the C. C. P. the only method of recovering under this certificate was by foreclosure of this lien.

The most obvious answer is that the action in this case is for damages for breach of the promise contained in the certificate to deliver bonds. The promise upon which suit is brought is unsecured. How Section 726 C. C. P., which applies to "actions for the recovery of any debt or the performance of any right secured by a mortgage" can possibly apply to an action of this character is inconceivable.

But even assuming that Section 726 would apply to an action of this character if the damages sought to be recovered were secured by an equitable lien, it is clear that the certificate upon which suit is brought could not in any event create an equitable lien. As plaintiffs in error admit, on pages ii and iii of their appendix, before an equitable lien can arise, the property to be subjected to the lien must be "so described that it can be identified"; and another essential to such a lien is "that an intention to create a charge on the property described

must be clear and apparent" (*19 Am. & Eng. Enc. of Law,* 14-15. See *Pomeroy,* Vol. 3, page 2471). No property is described in the certificate so that it can be identified, and as a matter of fact no property is referred to therein in any way; neither is there any intention manifested in the certificate to charge any property with a lien. The conclusion is that from whatever point of view the certificate is considered it could not create an equitable lien.

In support of their contention that an equitable lien was created by the certificate the plaintiff in error cite and quote from the case of *Beal v. United Properties Co.,* 189 Pac. 346; 31 C. A. D. 656. The agreement which was the basis of the action in the Beal case was not one of the certificates which is sued on here; but it was an oral agreement by which The United Properties Company agreed to deliver bonds secured by a deed of trust "covering all the real and personal property" of the company. The distinction between the contract forming the basis of the action in the Beal case and the certificate sued on here is manifest. An equitable lien might have been created in the former case, while it could not possibly exist in this.

Assuming that an equitable lien was created and that it would constitute a defense to this action, it was a new matter which should have been specially pleaded in the answer (Section 437 C. C. P.). As the plaintiffs in error did not plead it in their answer, they could not take advantage of it in the

trial court, and, of course, they cannot do so in this court.

Lastly, assuming that an equitable lien was created and that it had been pleaded as a defense, it could not constitute a defense to the action. A right to a personal action to recover a debt secured by a mortgage is prohibited by Section 726 C. C. P. But plaintiffs in error could not possibly claim that the relationship of mortgagor and mortgagee was raised by the certificate; they must then contend that the certificate created an equitable lien. In *Peoples' Home Savings Bank v. Sadler,* 1 Cal. App. 190, 192, it was held that the limitation upon the form of action which is declared in Section 726 C. C. P. extends only to "mortgages"; that the essential element of a mortgage is a transfer and conveyance of the mortgage property; and that, therefore, a corporation could collect an indebtedness due it by a stockholder without foreclosing the lien which the bylaws created upon his interest in the corporation as security for the indebtedness. It was held in *Samuel v. Allen,* 98 Cal. 406, that an independent action could be maintained on an indebtedness although the plaintiff had a vendor's lien as security. This case was followed in *Longmaid v. Coulter,* 123 Cal. 208.

In *11 Am. & Eng. Ency. of Law,* 129, the author on Equitable Mortgages says:

> "In agreements for the sale of land the relation between the vendor and the vendee is in equity analogous to that of an equitable mort-

> gagee and mortgagor, the vendee holding an equity which is liable to foreclosure at the suit of the vendor."

It thus appears that the cases just cited are directly in point and that the basis of the argument of plaintiffs in error is thus swept away. The conclusion is that in no aspect of this case can Section 726 C. C. P. apply; and therefore the final argument of plaintiffs in error must fail.

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### CONCLUSION.

In conclusion we wish to state merely that all the points raised by plaintiffs in error are extremely technical and hypercritical and that they are without any merit. The United Properties Company contracted to deliver to defendant in error thirteen bonds. It failed to do so, and for this breach of contract it must respond in damages. Nothing a resourceful counsel can say can alter this fact. We respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco,
May 7, 1921.

Respectfully submitted,

KEYES & ERSKINE,
*Attorneys for Defendant in Error.*

No. 3194

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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NATALIO PENEYRA and NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Appellant,

vs.

THE AMERICAN STEAMSHIP "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee, Claimant and Owner Thereof,

Appellees.

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# Apostles on Appeal.

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**Upon Appeals from the United States District Court for the Territory of Hawaii.**

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys.**

For Libellant:

GEO. A. DAVIS, FRED PATTERSON and J. J. BANKS, Honolulu, Hawaii.

For Libellee and Claimant:

SMITH, WARREN & WHITNEY, Honolulu, Hawaii. [1*]

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*In the United States District Court in and for the District and Territory of Hawaii.*

No. 172.

NATALIO PENEYRA, etc.,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, etc.,

Libellee.

**Order Extending Time to July 24, 1918, to Transmit Record on Appeal.**

Now, on this 24th day of June, A. D. 1918, it appearing from the representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of errors in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this

*Page-number appearing at foot of page of original certified Apostles on Appeal.

cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of errors in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to July 24, 1918.

Dated at Honolulu, Hawaii, June 24, 1918.

HORACE W. VAUGHAN,
Judge, United States District Court.

Filed June 24, 1918. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk. [2]

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*In the United States District Court in and for the District and Territory of Hawaii.*

No. 172.

NATALIO PENEYRA, etc.,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, etc.,

Libellee.

**Order Extending Time to August 24, 1918, to Transmit Record on Appeal.**

Now, on this 24th day of July, A. D. 1918, it appearing from the representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Cir-

cuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of errors in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of errors in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to August 24, 1918.

Dated at Honolulu, Hawaii, July 24, 1918.

HORACE W. VAUGHAN,
Judge, United States District Court.

Filed July 24th, 1918, at 2 o'clock and 0 minutes P. M. A. E. Harris, Clerk. By ———, Deputy Clerk. [3]

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**Clerk's Statement Under Admiralty Rule 4.**

TIME OF COMMENCING SUIT.

March 16, 1918: Verified libel was filed and monition issued to the United States Marshal for the District of Hawaii.

NAMES OF ORIGINAL PARTIES.

Libellant: Anatalio Pinira, an insane person, by Adriano Borha, his guardian *ad litem.*

Libellee: The American steamship "Kinau" her engines, machinery, boilers, tackle, apparel, boats, furniture and appurtenances.

DATES OF FILING OF PLEADINGS.

March 16, 1918: Libel.

April 5, 1918: Answer of Claimant.

ATTACHMENT OF PROPERTY AND PROCEEDINGS.

March 16, 1918: Monition was issued and delivered to the United States Marshal for the District of Hawaii. Said monition was thereafter returned into court with the following return by the said marshal:

> "In obedience to the within Monition, I attached the Amer. S. S. 'KINAU' therein described, on the 18th day of March, A. D. 1918, and have given due notice to all persons claiming the same that this Court will, on the 5th day of April, A. D. 1918 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same.
>
> J. J. SMIDDY,
> United States Marshal.
> By L. K. Silva,
> Deputy.
>
> Honolulu, March 18th, 1918." [4]

March 18, 1918: Claim filed by the Inter-Island Steam Navigation Company, Limited by its 2d vice-president and its acting treasurer, as true and lawful owners of the American steamship "Kinau" her engines, etc., together with a bond to the United States marshal for the District of Hawaii, in the sum of twenty thousand dollars (under section 941

of the Revised Statutes of the United States). Notice of said bonding and release was given to the said Marshal by the Clerk of said Court.

TIME WHEN TRIAL WAS HAD.

The above-entitled cause came on regularly for trial in the United States District Court for the Territory of Hawaii, before the Honorable Horace W. Vaughan, Judge of said court, on the following days, to wit: April 5, 1918, April 23, 1918, April 24, 1918, May 3, 1918, and May 10, 1918.

At the trial of said cause the following witnesses were examined (*viva voce*) and gave their evidence in open court before the said Judge of said court.

Witnesses called on behalf of the libellant: Adriano Borha, Henry Aki, Valentine Cabacha, Pablo Sanches, R. G. Ayer, W. A. Schwallie, Eduara Pinaira and Leonardo Pinera. On May 13, 1918, upon request of proctor for the libellant, Mr. Geo. A. Davis, the libellant was called and examined by the Court.

Witnesses called on behalf of the libellee: John Wailiula, Kui Lobo, A. M. Aika, Kua Pu, Capt. James Gregory, David Kamiopili, O. J. Ottersen.

May 20, 1918: Opinion in cause, Vaughan, Judge.

May 23, 1918: Decree filed and entered. [5]

May 23, 1918: Notices of Appeal Filed.

May 23, 1918: Assignments of Error.

**Clerk's Certificate to Statement Under Admiralty Rule 4.**

United States of America,
District of Hawaii,—ss.

I, A. E. Harris, Clerk of the United States Dis-

trict Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of the commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; an account of the proceedings showing the attachment of the said vessel and her release under bonds; the time when the trial was had and the name of the Judge hearing the same; the date of entry of the final decree and the date when the notice of appeal was filed and the date when the assignments of error was filed in the case of Natalio Peneyra, etc., vs. The American Steamship "Kinau," Her Engines, etc., Admiralty Number 172.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 25th day of July, A. D. 1918.

A. E. HARRIS,

Clerk U. S. District Court, Territory of Hawaii. [6]

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[Endorsed]: In the United States District Court for the Territory of Hawaii. In Admiralty—*In Rem.* Anatalio Pinira, an Insane Person, by Adriano Borha, His Guardian *Ad Litem,* Libellant, vs. The American Steamship "Kinua," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture, and Appurtenances. Suit for Damages for Breach of Marine Contract for not Carrying Passenger Safely, and for Damages, Expenses and Maintenance. Libellant's Libel. Filed March 16, 1918, at 11 o'clock A. M. (Sgd.) A. E. Harris, Clerk. [7]

*In the District Court of the United States in and for the District and Territory of Hawaii.*

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, ANATALIO PINIRA, an Insane Person, by ADRIANO BORHA, His Guardian *Ad Litem*,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee.

SUIT FOR DAMAGES FOR BREACH OF MARINE CONTRACT FOR NOT CARRYING PASSENGER SAFELY, AND FOR DAMAGES, EXPENSES AND MAINTENANCE.

**Libellant's Libel.**

To the Honorable Judges of the District Court of the United States in and for the District and Territory of Hawaii.

The libel of Anatalio Pinira, an insane person, by Adriano Borha, his guardian *ad litem,* now residing in the District of Hawaii and within the jurisdiction of this Honorable Court, late a passenger on board the steamship "Kinau," whereof James Gregory is or lately was master, against the said steamship, her engines, machinery, boilers, tackle, apparel, boats, furniture and appurtenances, in a cause of damage,

civil and maritime for a breach and breaches of the marine contract entered into between the libellant and the libellee, Anatalio Pinira, and the said libellee alleges and charges as follows:

1.

That on or about the 19th day of December, A. D. 1917, the said steamship "Kinau" was engaged in carrying and conveying passengers [8] and freight for hire and reward from the port of Honolulu on the Island of Oahu to the port of Nawiliwili on the Island of Kauai, and to other ports and places on the Island of Kauai and from the said port of Nawiliwili and other ports and places on the Island of Kauai to the port of Honolulu aforesaid, and is owned and operated by the Inter-Island Steam Navigation Company, Limited, an Hawaiian corporation, which said corporation on the 19th day of December, A. D. 1917, had a ticket office and duly authorized agent at the port of Nawiliwili, who was then authorized to sell tickets for the conveyance of passengers from the said port of Nawiliwili to the said port of Honolulu, and the said Anatalio Pinira then being at the said port of Nawiliwili aforesaid, applied to the said agent of said corporation for a ticket and a first-class passage from the said port of Nawiliwili to the port of Honolulu aforesaid, and he paid to the said agent for the said ticket and the said first-class passage from the port of Nawiliwili to the port of Honolulu aforesaid, the sum of eight dollars and eighty-six ($8.86) cents, and accordingly received said ticket for said first-class passage from the port of Nawili-

wili, Island of Kauai, to the port of Honolulu, Island of Oahu, and Territory of Hawaii, on the said 19th day of December, A. D. 1917, from the said agent. And accordingly the said Anatalio Pinira was taken on board of one of the small boats run and operated by the master and officers of the steamship "Kinau" and under their direction and control from said landing at Nawiliwili to the said steamship "Kinau," which was then lying in the Harbor of Nawiliwili at anchor, and the said Anatalio Pinira was assisted from said small boat so run and operated as aforesaid on to the said steamship "Kinau," and was taken and placed below the main deck, and after being received on board as such passenger and being below [9] the main deck and on the second deck of said steamship "Kinau," the second officer of said steamship "Kinau" ordered the said Anatalio Pinira to go down into the steerage and then and there shoved him back from the side of the said steamship and on the second deck thereof, and it being dark the said Anatalio Pinira without any fault or negligence on his part and by reason of the negligence and improper conduct of the master and officers of said steamship fell down through an open hatch which was then open, unguarded and improperly lighted, into the hold of said steamship, a distance of about fifteen feet, and struck his head against the freight then stored and being in the hold of said steamship "Kinau," and sustained serious and permanent wounds, bruises and injuries in and upon his head and other portions of his body, and from the effects

of this said injuries the said Anatalio Pinira lost his reason and became insane and was declared insane by a court of competent jurisdiction, and the said Anatalio Pinira then and there suffered and underwent great pain of body and mind and sustained other and serious wounds, bruises and injuries in and upon his head and body and became sick and ill and was forced and compelled to pay out and expend and did pay out and expend a large sum of money for medical and surgical attendance.

2.

That on or about the 19th day of December, A. D. 1917, at Nawiliwili aforesaid, the owners of said steamship "Kinau," upon application to its proper and duly authorized agent, sold to the said Anatalio Pinira a ticket for a valuable consideration entitling him, the said Anatalio Pinira, to be carried and conveyed as a first-class passenger from the port of Nawiliwili aforesaid to the port of Honolulu aforesaid, and on the day and year aforesaid at Nawiliwili aforesaid, he, the said Anatalio Pinira, was received on board said steamship "Kinau," then lying at anchor in the Harbor of Nawiliwili as such passenger, the said steamship "Kinau" then being run and operated as a passenger steamship [10] between the port of Nawiliwili on the Island of Kauai to the port of Honolulu in the Territory of Hawaii, and the master and owners of said steamship, for and on behalf of said steamship, undertook and agreed to carry and convey the said Anatalio Pinira from the said port of Nawiliwili aforesaid to the port of Honolulu

aforesaid safely and without injury, and to use due and reasonable care in and about the conveyance of the said Anatalio Pinira from said port of Nawiliwili to the port of Honolulu aforesaid, and it became and was the bounden duty of the master of said steamship "Kinau" and its officers and the owner of said steamship to assign the said Anatalio Pinira to that portion of the said steamship set aside for first-class passengers, but the master and officers of said steamship in violation of said contract and agreement and of the obligations arising from said marine contract, and not regarding their duty and obligations in that behalf, forced the said Anatalio Pinira and told him to go to the steerage quarters on board of said steamship, and the master and officers of said steamship in violation of their said contract and agreement so entered into between the said Anatalio Pinira and the owners of said steamship, upon receiving the said Anatalio Pinira on board of said steamship negligently and improperly left the hatch on the second deck of said vessel open and unguarded and insufficiently lighted, and the said Anatalio Pinira in attempting to obey the order of the second officer of said steamship to go down into the steerage quarters of said steamship and without any fault on his part, and by reason of such negligence as aforesaid, suddenly stepped into large and dangerous space from which the hatch had been removed and left so unguarded and unlighted as aforesaid, and fell down into the hold of said steamship a distance of about fifteen feet, and sustained severe and serious injuries

to his head and other parts of his body, and from which said injuries so occasioned as aforesaid the said Anatalio Pinira lost his reason and became insane and became sick and ill and suffered and underwent great pain of body and mind. [11]

And the said libellant further alleges and charges that on or about the 19th day of December, A. D. 1917, at the port of Nawiliwili on the Island of Kauai, he, the said Anatalio Pinira, engaged a first-class passage from the said port of Nawiliwili on the Island of Kauai, to the port of Honolulu on the Island of Oahu, and paid his fare and passage money for his ticket and passage as a first-class passenger from the port of Nawiliwili aforesaid to the port of Honolulu aforesaid, and on the day and year aforesaid the master and officers of said steamship "Kinau," for and in behalf of said steamship and its owners, received the said Anatalio Pinira on board the said steamship "Kinau" as a first-class passenger and undertook, contracted and agreed to carry and convey him safely and without injury from the port of Nawiliwili aforesaid to the port of Honolulu aforesaid, yet the said master and officers of said vessel, in violation of said contract and agreement so entered into as aforesaid, between the said steamship, the owner thereof, and by the second officer of said steamship, ordered and directed the said Anatalio Pinira to go down into the steerage quarters and treated him in a rough and improper manner and shoved him over towards the hatchway on the second deck of said vessel, which was open, unguarded and unlighted, and the said Anatalio

Pinira in obeying said order and directions to go into the steerage quarters, and without any fault or negligence on his part, stepped into said hatchway and fell down into the hold of said steamship, a distance of about fifteen feet and sustained serious and permanent wounds, bruises and injuries to such an extent that he lost his reason and became and now is insane, and was declared insane in the month of December, A. D. 1917, after he received said injuries, by a court of competent jurisdiction. And that on or about the 29th day of January, A. D. 1918, upon application [12] duly made by Adriano Borha, the Judge of the Circuit Court of the Fifth Judicial Circuit of the Territory of Hawaii, sitting at Chambers in probate, and after a hearing upon said application appointed the said Adriano Borha guardian of the person and property of the said Anatalio Pinira, who had been and was adjudged insane, and he, the said Adriano Borha, is now the guardian of the person and property of the said Anatalio Pinira, an insane person. That the said American steamship "Kinau" is an American steamship and duly registered as such in the Territory of Hawaii, and was on the 19th say of December, A. D. 1917, engaged in the transportation and conveyance of passengers and freight for hire and reward between the port of Nawiliwili on the Island of Kauai and the port of Honolulu on the Island of Oahu, and is owned and operated by the Inter-Island Steam Navigation Company, Limited, an Hawaiian corporation, for the purposes aforesaid, and said steamship is now lying at the port of Honolulu in the Dis-

trict of Hawaii and is about to proceed to sea.

4.

And the said libellant, by his guardian *ad litem,* further alleges and charges that by reason of the violation of the duty of the master and officers of the said steamship and the breach of the marine contract and agreement entered into between this libellant and the said steamship and the owners thereof, to carry and convey this libellant from the port of Nawiliwili to the port of Honolulu aforesaid, safely and without injury, he suffered and sustained the injuries and bruises as aforesaid, and was and is permanently injured and disabled, and by reason thereof and because of said injury he became insane and is now insane and claims damages in the sum of ten thousand dollars ($10,000), together with the costs of this suit, and the said libellant further alleges that the said Anatalio Pinira, an insane person, has no money or property within or without the [13] jurisdiction of this court and is wholly unable to furnish any bond or stipulation for costs or to make any deposit for costs, and no other person or persons is interested in this suit who is able to furnish any bond or stipulation for costs, and the libellant prays that this Court will order and direct that the said Anatalio Pinira, an insane person, be allowed to begin and prosecute this suit by his guardian *ad litem,* Adriano Borha, from the commencement thereof and down to final decree and until the further order of this Court without filing bond or stipulation for cost or otherwise, as a poor person, and the said Anatalio Pinira is now an insane person

and is not competent to look after his business or affairs or to bring this suit, and the said Adriano Borha, who is now the guardian of the person and property of the said Anatalio Pinira, prays that he may be appointed the guardian *ad litem* of the said Anatalio Pinira, the libellant in this suit, and that such order be made and entered up forthwith. And the said libellant prays for such other and further relief as he may be entitled to in the bringing of this suit in admiralty and justice.

5.

That all and singular the premises were and are true and within the admiralty and jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the said Adriano Borha, for and on behalf of the libellant, prays that until thefurther order of this Court he may be allowed to file this libel and prosecute this suit as the guardian *ad litem* of Anatalio Pinira, an insane person, down to final hearing and decree without furnishing any bond or stipulation for costs as provided by the rules of this court, and that the United States Marshal for the District of Hawaii may be directed to serve such process and other papers without any deposit for costs being first made and without requiring the payment of his fees for service, and that the [14] clerk of this court issue such process and do all such acts and things as may be necessary in the premises, until the further order of this Court, without requiring any bond or stipulation or deposit for costs first being made by said insane person or his guardian a*d litem.* And the said libellant by his said guardian *ad litem*

further prays that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said steamship, her engines, boilers, machinery, tackle, apparel, boats, furniture and appurtenances, and that all persons having interest therein may be cited to appear and answer all and singular the matters herein set forth, and that this Honorable Court will be pleased to decree the payment of the damages for the breaches of the marine contract aforesaid, with costs, and that the said steamship, her engines, boilers, machinery, tackle, apparel, boats, furniture and appurtenances may be condemned and sold to pay the same, and that the libellant by his guardian *ad litem* may have such other and further relief in the premises as in admiralty and justice he may be entitled to receive.

ANATALIO PINIRA,
An Insane Person,
By (Sgd.) ADRIANO BORHA,
His Guardian *Ad Litem.*

Dated at Lihue, Hawaii, this 12th day of March, A. D. 1918. **[15]**

United States of America,
District of Hawaii,
County of Kauai,—ss.

Now comes Adriano Borha, and upon being first duly sworn upon his oath deposes and says that he has read the foregoing libel in this suit and that he has a personal knowledge of the facts and statements therein set forth and contained, and that on the 29th day of Jannary, A. D. 1918, he was duly appointed

the guardian of the person and property of Anatalio Pinira, an insane person, and the libellant in this suit, and that the facts, statements and allegations set forth and contained in the foregoing libel are just, true and correct.

(Sgd.) ADRIANO BORHA.

Subscribed and sworn to on this 12th day of March, A. D. 1918, before me

[Seal] (Sgd.) K. C. AHANA,

A Notary Public in and for the Fifth Judicial Circuit of the Territory of Hawaii. [16]

**Order Appointing Adriano Borha Guardian Ad Litem.**

Upon perusing the foregoing libel I do order and direct that Adriano Borha be and he is hereby appointed the guardian *ad litem* in this suit of and for the libellant, Anatalio Pinira, an insane person, and he is hereby authorized to begin and prosecute this suit as such guardian *ad litem* from the issuing of process down to final decree until the further order of this court. And that the said Anatalio Pinira, an insane person, the libellant herein, by his said guardian *ad litem,* shall commence and prosecute said suit in *forma pauperis,* and I hereby further order and direct that neither the said libellant nor his said guardian *ad litem* shall be required to make any deposits for costs or to file any bond or stipulation for costs in this suit until the further order of this court, and the clerk of this court is hereby directed to file this libel, issue process as prayed for and file all other papers and documents, and do all

such other acts and things as may be necessary herein without the filing any bond or stipulation for costs or making any deposit by the said libellant or his guardian *ad litem.* The United States Marshal is hereby required and commanded to serve the process issued herein and all other papers and documents in this suit and do all such acts and things as may be necessary without the payment of any fees or deposit for costs being made until the further order of this court.

Let process issue as prayed for returnable on Friday, the 5th day of April, A. D. 1918, at 10 o'clock in the forenoon of said day.

And I do hereby appoint George A. Davis and J. J. Banks and Fred. Patterson, proctors for the libellant in this suit. Let this order be entered up forthwith.

Dated this 16th day of March, A. D. 1918.

[Seal] (Sgd.) J. B. POINDEXTER,
Judge U. S. District Court for the Territory of Hawaii. [17]

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[Endorsed]: No. 172. In the District Court of the United States for the Territory of Hawaii. In Admiralty—In Rem. Anatalio Pinira, an Insane Person, by Adriano Borha, His Guardian *ad Litem,* Libellant, vs. The American Steamship "Kinau," Her Engines, Machinery, etc., Libelee. Answer of Claimant. Smith, Warren & Whitney, Bank of Hawaii Building, Honolulu, T. H., Proctors for Claimant. Filed Apr. 5, 1918, at 3 o'clock P. M.

A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

Service of the within Answer is admitted this 5th day of April, 1918.

GEO. A. DAVIS,
J. J. BANKS,
Proctors for Libellant. [18]

*In the District Court of the United States in and for the District and Territory of Hawaii.*

IN ADMIRALTY—IN REM.

ANATALIO PINIRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libelee.

**Answer of Claimant.**

To the Honorable Judges of the United States District Court for the District and Territory of Hawaii:

Now comes the Inter-Island Steam Navigation Company, Limited, owner and claimant of the above-named American Steamship "Kinau," her engines, machinery, boilers, tackle, apparel, boats, furniture and appurtenances, and for answer to the libellant's

libel in the above-entitled cause says:

I.

Answering the allegations of paragraphs 1, 2 and 3 of said libel, claimant admits that the libellant Anatalio Pinira (named on his passage ticket as "Natalio Beneela"), purchased a ticket for first-class passage on said steamship "Kinau" on or about the 19th day of December, 1917, from Nawiliwili to the port of Honolulu, and [19] was carried to and received on board said vessel; but claimant denies that after said libellant was received on board said vessel he was taken or placed below the main deck, and denies that the second officer or any officer or employee of said vessel in any manner ordered, told, required or forced said libellant to go into the steerage, and/or pushed, shoved or forced libellant in any manner or at all, at any place or time whatsoever, or treated him in a rough or improper manner in any respect, and denies that it was dark on the second deck of said vessel.

Further answering said paragraphs 1, 2 and 3, claimant admits that the said libellant while on the second deck of said vessel fell into an open hatch into the hold of said vessel a distance of about eight feet and struck his head on the floor or some object in said hold and sustained some injury, the nature and extent whereof claimant is ignorant, but upon information and belief claimant denies that the said injuries were serious or permanent, and denies that from the effects thereof the said Anatalio Pinira lost his reason or became insane.

Further answering said paragraphs 1, 2 and 3,

claimant denies that the hatch into which the libellant fell was left improperly open or unguarded or was improperly lighted, and alleges on the contrary that at the time of said accident said hatch was open and in actual use for the reception and deposit of freight and baggage therein, and further alleges that the premises around and near the said hatch were fully and adequately lighted.

II.

Further answering the allegations of said libel with respect to the alleged insanity of the libellant, this claimant says that it has no knowledge sufficient to enable it to answer the allegations that the libellant was or is insane, and therefore requires proof thereof. [20]

III.

Claimant further admits that it is a common carrier of freight and passengers by water within the jurisdiction of this Honorable Court.

IV.

Claimant further denies that by reason of the injury or injuries sustained by the libellant at the time alleged in said libel the said libellant was or is damaged in the sum of Ten Thousand Dollars ($10,000), or at all, by reason of any act or fault of this claimant.

WHEREFORE claimant prays that the said libel may be dismissed with costs.

Dated Honolulu, T. H., April 5th, 1918.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,

(Sgd.) By NORMAN E. GEDGE,
Vice-President.

(Sgd.) By S. B. ROSE,
Acting Treasurer.

SMITH, WARREN & WHITNEY,
Proctors for said Claimant.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Norman E. Gedge, being duly sworn, deposes and says that he is the Vice-President of the Inter-Island Steam Navigation Company, Limited, a Hawaiian corporation, claimant in the above-entitled cause, whose answer is above set forth; that he has read said answer and knows the contents thereof and that the matters therein stated are true except that as to the matters stated on information and belief and he believes them to be true.

(Sgd.) NORMAN E. GEDGE.

Subscribed and sworn to before me this 5th day of April, 1918.

[Seal] (Sgd.) A. K. AONA,
Notary Public, First Judicial Circuit, Territory of Hawaii. [21]

**Libelant's Exhibit "A"—Letters of Guardianship.**

*In the Circuit Court of the Fifth Circuit, Territory of Hawaii.*

AT CHAMBERS—IN PROBATE.

In the Matter of the Guardianship of ANATALIO PINIRA, an Insane Person.

LETTERS OF GUARDIANSHIP.

Adriano Borha, of Lihue, County of Kauai, Territory of Hawaii, is hereby appointed guardian of the person and property of Anatalio Pinira, an insane person.

By order of the Honorable LYLE A. DICKEY, Judge of the Circuit Court of the Fifth Judicial Circuit, this 29th day of January, 1918.

[Seal] (Sgd.) D. WM. DEAN,
Clerk of the Circuit Court of the Fifth Circuit.

I hereby certify that the foregoing is a true copy of the letters of guardianship made and filed in the guardianship of Anatalio Pinira, an insane person.

Attest my hand and the seal of the said Court at Lihue, Kauai, territory of Hawaii, this 29th day of January, A. D. 1918.

[Seal] (Sgd.) D. WM. DEAN,
Clerk Circuit Court, Fifth Circuit.

Libellant's Exhibit "A." Filed Apr. 5, 1918. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [22]

Libelee's Exhibit No. 1—Certificate of Discharge.

DUPLICATE.

BEFORE THE COMMISSIONERS OF INSANITY OF THE TERRITORY OF HAWAII.

No. 2221.—Asylum Index.

In the Matter of the Application for the Discharge of ANATALIO PINIAR (also Known as ANATILIO PINIRA), from the Insane Asylum.

CERTIFICATE OF DISCHARGE.

To the Superintendent of the Insane Asylum:

Sir: Whereas, at a meeting of the Commissioners of Insanity of the Territory of Hawaii held at the Insane Asylum in Honolulu on May 2d and 3d, 1918, the undersigned Commissioners made examination of one Anatalio Piniar (also called Anatilio Pinira), heretofore committed to the asylum as an insane person, and heard evidence upon the application for the discharge of said patient, and upon such examination and the record shown are satisfied that said patient is now sane, and may be released without danger to the public safety.

Therefore, you are hereby authorized and directed to discharge the said Anatalio Piniar (or Anatilio Pinira) from the Insane Asylum.

Dated Honolulu, T. H., May 3d, 1918.

By the Commissioners:

(Sgd.) GEORGE HERBERT.

(Sgd.) CHAS. B. COOPER, M. D.

Libellee's Ex. 1. Filed May 10, 1918. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

[23]

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*In the United States District Court, in and for the Territory of Hawaii.*

AD.–172.

ANATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem, Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Boats, Furniture and Appurtenances,

Libellee.

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Honolulu, H. T., July 1, 1918.

Filed July 1, 1918. A. E. Harris, Clerk. By Wm. L. Rosa, Deputy Clerk. **[24]**

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*In the United States District Court, in and for the Territory of Hawaii.*

AD.–172.

IN ADMIRALTY—IN REM.

Before the Honorable HORACE W. VAUGHAN,

Judge of said Court.

ANATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Boats, Furniture and Appurtenances,

Libellee.

APPEARANCES:

For the Libellant:

GEORGE A. DAVIS, J. J. BANKS, and FRED PATTERSON, Esquires.

For the Libellee:

L. J. WARREN, Esquire, of the Firm of Messrs. SMITH, WARREN & WHITNEY.

**Transcript of Testimony. [25]**

Honolulu, H. T., April 5, 1918.

2:00 P. M.

Mr. WARREN.—This being the return day, I

would ask that the names of Smith, Warren & Whitney be entered as counsel for the Inter-Island Steam Navigation Company, Limited. I would state that the answer of the claimant has just been filed.

Mr. DAVIS.—It is stipulated, subject to your Honor's approval, that he shall have leave at any time, subject to the approval of the Court, to file a supplemental statement, supplemental answer.

The COURT.—All right.

**Testimony of Adriano Borha, for Libelant.**

Direct Examination of ADRIANO BORHA, for Libellant, sworn.

Mr. DAVIS.—What is your name?

A. Adriano Borha.

Q. Where do you reside, Borha?

A. At the present time I live in Ahuula Street, Kalihi.

Q. But you are employed at the Immgiration Station? A. Yes, sir.

Q. As Interpreter? Filipino Interpreter?

A. Yes, sir.

Q. And do you know Anatalio Peneyra?

A. I know him.

Q. What nationality is he?

A. He is Filipino.

Q. How old is he?

A. He is about forty-five years old.

Q. Where is he now? A. I saw him— [26]

Q. Is he in the insane asylum?

A. Yes, sir.

(Testimony of Adriano Borha.)

Q. Here in Honolulu? A. Yes, sir.

Q. Was you present when he purchased a ticket from the Inter-Island Steamship Company?

A. No.

Q. You were not present? A. No.

Q. You don't know anything about that?

A. I don't know.

Mr. WARREN.—I am willing to make the admission that Anatalio Peneyra did purchase a first-class passage ticket for passage from Nawiliwili to Honolulu, and was received on board the vessel.

The COURT.—All right.

Mr. DAVIS.—Were you appointed as guardian of Anatalio Peneyra?

A. Yes, sir.

Mr. DAVIS.—I offer certified copies, your Honor, of the letters of guardianship under seal of the Circuit Court of the Fifth Circuit.

Q. Was he a resident of the Island of Kauai at the time you were appointed his guardian, he resided on Kauai, lived on Kauai?

A. I think he was brought to Honolulu—

Q. I know, but he lived there, that's where his home was? A. Yes, sir.

The COURT.—Ask him where he stayed. He stayed on Kauai?

A. Yes, sir.

Mr. DAVIS.—Are you the guardian of this insane person at the present time? **[27]**

A. Yes, sir.

Q. Has he got any children?

(Testimony of Adriano Borha.)

A. He has one.

Q. How old is it?

A. Between six and seven years old.

Q. Where is his wife?

A. He is a widower, he has no wife.

Q. Well, where is that child now?

A. In my house.

Q. Living with you? A. Yes, sir.

Q. You say you were not present with him on the trip that he came up here? A. What is that?

Q. You wasn't present with him on the trip when he come up here. A. I wasn't there.

Q. Do you know anything about his injuries?

A. I just heard from the sheriff.

Q. Never mind what you heard, but do you know of your own knowledge of any injury he received?

A. Yes, when I saw him in the hospital he had some cloths around his head.

Q. What hospital? A. Lihue.

Q. Where were they placed?

A. Around his head.

Q. You mean what, you said cloths? A. Cuts.

Q. You mean wounds, you mean cuts?

A. Yes.

Q. Around his head? A. Yes.

Q. How long was he in the Lihue hospital?

A. I think about one week, I am not quite sure.

[28]

Q. And then they took him from there to the insane asylum?

The COURT.—I don't understand a thing in the

(Testimony of Adriano Borha.)

world about this case. Give me a short statement so I can catch the drift of his testimony.

Mr. DAVIS.—A short statement of the case is this, your Honor, that this man, this insane person, Anatalio Peneyra, purchased a first-class ticket, and this is his guardian *ad litem*. The man that was injured is insane, and he purchased a first-class ticket from Nawiliwili to Honolulu on board the steamship "Kinau," as alleged and set out in the libel, and when he went on board the vessel the libel sets out that he was ordered by an officer of the vessel to go to the steerage. They made a mistake and thought he was a second-class passenger and they ordered him *to* down to the steerage, and the place was dark and they left a hatch open and they backed him down through the hatchway and injured his head to such an extent that he became insane. That's the whole thing.

Mr. WARREN.—We deny the facts and that the injury did not result from any negligence on the part of the company.

Mr. DAVIS.—And Mr. Warren also admits that he did purchase a first-class ticket from the Inter-Island Steamship Company for that passage as alleged in the libel.

The COURT.—All right, gentlemen.

Mr. DAVIS.—Do you know anything else about the case?

A. That is all I know. I was called by the sheriff, Mr. Rice, and—Mr. Rice told me—

(Testimony of Adriano Borha.)

Q. Never mind what he told you; that's not evidence. [29]

A. That's all I know. When I went to the hospital I found him lying on the bed with his head tied with a piece of cloth.

Q. But you do know now that he is in the insane asylum and suffering? A. I know.

Q. And you have been appointed his guardian *ad litem?* A. Yes, sir.

Q. And you are willing to act? A. Yes, sir.

Mr. DAVIS.—I offer this in evidence, your Honor, and ask that it be marked Libellant's Exhibit 1.

The COURT.—Mr. Warren?

Mr. WARREN.—No objections.

The COURT.—All right.

Cross-examination of ADRIANO BORHA.

Mr. WARREN.—How long has this man been in the insane asylum?

A. Well, about three months now.

Q. Have you seen him since he has been there, have you seen him up there, called on him?

A. You mean here?

Q. Yes. A. Yes, I saw him.

Q. How many times? A. One time.

Q. How long ago? A. Last week.

Q. Just once since he has been in there? [30]

A. Yes, sir.

Q. Did you talk to him?

A. Yes, I talked to him.

(Testimony of Adriano Borha.)

Q. What did you talk about?

A. I asked him how much money he had in his trunk, and he told me, and he asked me about the case, and I asked him whether he remembered when he fell on the steamer, and he said no, he doesn't remember, and he said he never fell down in the steamer.

Q. Said what? A. That's all what he said.

Q. He said what?

A. He said when I asked him whether he remembered when he fell down in the steamer he said he don't know anything about it, never fell down in the steamer. That's what he told me.

Q. Did he tell you where his money was, in his trunk, you say? A. Yes, he told me.

Q. And he asked you how this case was getting on. Just tell us as near as you can remember what the conversation was, what he said and what you said.

A. I asked him whether he remembered when he fell down in the steamer and he said he doesn't know anything, and he said he never fell down in the steamer, but he asked me whether I got his money, and I said, "Yes, I got your money; I put it in the bank."

Q. Did he tell you how much it was?

A. Yes—he didn't tell me, but he just asked me if I got [31] his money.

Q. Did you tell him where you got it?

A. Yes, I told him.

Q. What did you tell him?

A. I told him it is in the bank; I put it in the bank.

(Testimony of Adriano Borha.)

Q. Where did you get the money?

A. Mr. Rice, the sheriff in Kauai, give me the money.

Q. Did you explain that to Peneyra?

A. I just told him I got his money and the money is in the bank. I got a receipt for his money.

Q. Then you said that he asked about the case, and asked you how the case was getting on?

A. No.

Q. He did not? A. He did not.

Q. When did you first know him?

A. I knew him when I first saw him in the hospital.

Q. Did you ever know him—when did you first see him?

A. When he went to the hospital, that's the time I know him; I never know him before.

Q. Did you talk to him there in the hospital at all?

A. Yes, sir; I spoke to him, but he couldn't answer right; he couldn't speak well.

Q. Is that the only time you ever spoke to him and have him answer you was when you saw him in the hospital this time?

A. Yes; I talked with him in the hospital, when they took him to the hospital I talked to him.

Q. After he had been in the hospital a few days he was able to talk to you at the hospital in Lihue,—did he talk to [32] you there?

A. When they sent him to Honolulu from the hospital he came to the Filipino and we spoke together.

Q. He came to a Filipino camp?

A. Yes, they took him there.

(Testimony of Adriano Borha.)

Q. What did you talk about that time?

A. I told him, "Don't be worried about the child," I would take good care of the child and care as my own child; that's what I told him, and he said, "I thank you for that."

Q. Did he seem to be worried about the child?

A. No.

Q. But he said, "I thank you for that?"

A. What?

Q. He said, "I thank you for that," did he?

A. Yes, sir.

Mr. WARREN.—That is all.

Mr. DAVIS.—That's all.

**Testimony of Henry Aki, for Libelant.**

Direct examination of HENRY AKI, for libellant, sworn.

Mr. DAVIS.—What is your name, please?

A. Henry Aki.

Q. Where do you reside, Mr. Aki? A. Kauai.

Q. On the Island of Kauai? A. Yes, sir.

Q. What is your business?

A. Automobile inspector. [33]

Q. And police officer? A. Yes, sir.

Q. How long have you been a police officer?

A. Nine months.

Q. On the 19th day of December, 1917, was you on board the steamship "Kinau?" A. Yes, sir.

Q. Where? A. At Nawiliwili.

Q. Did you go aboard as a passenger, or for what purpose?

(Testimony of Henry Aki.)

A. Yes, I went on the "Kinau" and came down to Honolulu to be examined for the training camp.

Q. But you were a passenger on that day; did you see this man Anatalio Peneyra, the fellow that fell down the hatch and got his head hurt—did you see him that day? A. Yes, sir.

Q. What time was it that he came on board?

A. Between six and seven o'clock.

Q. Between six and seven o'clock?

A. Yes, sir.

Q. And how did he come—in a small boat from the landing? A. Yes, sir.

Q. And then from the small boat how did he get on the "Kinau"?

A. They had a ladder going up on the side of the boat.

Q. Where was he taken—on the top deck or below the top deck?

Mr. WARREN.—I think that is a little bit leading.

Mr. DAVIS.—All right.

Q. How did he get on board? Just describe to the Court how he got on board in your own language.

A. There is a ladder there on the steamer that is lowered [34] down where the passengers get on. He climbed up and went upstairs and went downstairs and got his luggage, and he had a little girl along with him, I presume about five or six years old, and he went downstairs looking around for his luggage, and as he goes around in the back by the

(Testimony of Henry Aki.)

hatch where they load up some of the freight, that place was all open.

Q. Yes; was it light?

A. No, sir; it was dark.

Q. Well, what happened to him?

A. It was dark; no passengers couldn't see it.

Q. What happened to him?

A. He fell down in the hold.

Q. Now, did you see anybody there asking him about his luggage?

A. No, sir, but I see his ticket.

Q. What kind of a ticket was it?

A. He had a yellow ticket, first-class ticket.

Q. And you saw that first-class ticket?

A. Yes, sir.

Q. Did you see any officers of the boat tell him to go to the steerage?

Mr. WARREN.—I object to that as leading.

Mr. DAVIS.—Hear any officer of the boat say anything to him?

A. No, sir, I did not.

Q. You didn't hear that? A. No, sir.

Q. Now, what distance did he fall down there?

A. About twelve or fourteen feet.

Q. Well, how did he come to fall in the hold? Just describe to the Court how he came to fall in. [35]

A. Well, the hatch was just like this, and this is where the boat is, and here is the hold.

Q. Yes.

A. And then he must have dropped off from there; I didn't see how he fell down, but I was there

(Testimony of Henry Aki.)

about a minute after he fell down; I was by him below holding his head, and in the meantime there was two sailors jumped down.

Q. Was there any officers of the boat there at the time he fell down? A. No, sir.

Q. Was there any sailors on the boat there at the time he fell?

A. Well, there were some sailors around, but I don't know whether they were right there at the time he fell or not.

Q. But they were there,—after he already fell you saw them there? A. Yes, sir.

Q. Where did they come from?

A. Coming from the other side of the steamer where they have a hold.

Q. Wasn't that between-decks?

A. Well, this is the main deck, and then there is the lower deck.

Q. Well, wasn't it between-decks where you were standing there? A. Yes, sir.

Q. Why had you been up there,—did you have a first-class ticket? A. Yes, but— [36]

Q. What were you doing there? Isn't that the steerage?

A. Yes, it was the steerage downstairs.

Q. Why were you there?

A. Well, the man called us to go downstairs and see about this Filipino that fell down, knowing we were police officers of the county of Kauai.

Q. I see; and you saw him when he fell?

A. Didn't see him when he fell but saw him down

(Testimony of Henry Aki.)

there. I came down and saw him and held his head, hands right on his head.

Q. You say there was no light there at the time?

A. No, sir; no lights.

Q. Dark? A. Dark.

Q. And this hatch was open? A. Yes, sir.

Q. How long was that before the steamship weighed anchor and put to sea?

A. That was the last boat coming in.

Q. Well, that would be about how long before the boat would start?

A. About an hour and a half.

Q. After the last boat? A. Yes.

Q. Did she lie there an hour and a half after that?

A. Yes, sir.

Q. For what purpose?

A. Took the man up to the hospital.

Q. I mean, was she ready to sail when he fell?

Mr. WARREN.—I object to that as calling for a conclusion on the part of the witness. [37]

Mr. DAVIS.—What time was she scheduled to sail?

A. Five o'clock.

Mr. WARREN.—Object to that as immaterial.

The COURT.—I don't know for what purpose it is, but I will let him answer.

Mr. DAVIS.—She was scheduled to sail at five o'clock but she didn't sail?

A. No, she didn't sail.

Q. Scheduled to sail at five o'clock?

A. Yes, sir.

(Testimony of Henry Aki.)

Q. Didn't sail until what time?

A. Oh, about half-past seven.

Q. And you say this was between six and seven?

A. Yes, sir.

Q. After the man fell, who brought him up out of the hold?

A. Two sailors down there; they lifted him up, and then there was some other sailors alongside the hatch helped pull him out.

Q. Did you see how he was, the extent to which he was injured?

A. I don't know how old he was. I presume about forty-six or forty-seven years old.

Q. I mean, just describe his injuries that you saw there.

A. I saw the injuries right on his head there, saw blood on there.

Q. And on his face, any cuts?

A. Well, I didn't see his face.

Q. Well, just describe it to the Court more fully, will you?

A. Right on top here, on the head there. [38]

Q. What kind was it—was it a wound?

A. Yes, blood coming out.

Q. Was he bleeding freely? A. No, not freely.

Q. But it was bleeding? A. Yes.

Q. Well, was the man insensible, or how did he act?

A. Well, he was—he couldn't do anything, when you would talk to him he didn't seem to understand.

Q. Didn't seem to understand. Then what did you do with him?

(Testimony of Henry Aki.)

A. They took him along and put him on the boat and sent him ashore and took him to the hospital, I think.

Q. Did you go ashore? A. No, sir.

Q. Have you seen the man since?

A. I saw him a couple of times coming down—

Q. That was after his injuries?

A. Yes, when he was over at the hospital.

Q. Where did you say you saw him?

A. Saw him a couple of times going down with a nightgown towards Napali way one morning I came from Napali.

Q. He went out with a nightgown on, without any clothes on? A. Yes.

Q. How long was that after this accident happened?

A. I don't really know; about two weeks, I think.

Q. Do you know whether he was sent to the insane asylum or not?

A. Yes, sir; one police officer brought him to Honolulu and I was down to the wharf to meet him.

Q. Here in Honolulu? A. Yes, sir.

Q. When they brought him up from Napali?

A. Yes, sir. [39]

Q. Where did they take him?

A. Insane asylum.

Q. Did you go up there?

A. No, we had a *mittimus* where to send this man.

Q. And with that paper you took this man, injured on that day, to the insane asylum in Honolulu?

(Testimony of Henry Aki.)

A. I didn't take him myself; the police officer took him.

Q. But you were with the police officer that did take him? A. Yes, sir.

Q. Is there anything else that you know about this case?

Mr. WARREN.—I object to that as incompetent.

Mr. DAVIS.—I mean with reference to the injuries received.

A. I know the first officer of the boat said it was the fault of the bos'n.

Mr. WARREN.—I move to strike that out as hearsay.

The COURT.—I will sustain that.

Mr. DAVIS.—Was that made at the time of this accident? A. Yes, sir.

Mr. WARREN.—I object to the question; the statement has been stricken out now; there is no proper foundation for it.

Mr. DAVIS.—That is part of the *res gestae.*

Q. How long after this accident happened was this statement made?

A. Just a couple of minutes.

Mr. WARREN.—I *most* to strike the answer.

Mr. DAVIS.—While the man was down in the hold? A. Yes.

Mr. WARREN.—After your Honor sustained the first objection there was no foundation for the second question. [40]

Mr. DAVIS.—Was he in the hold when the statement was made? A. Yes, sir.

(Testimony of Henry Aki.)

The COURT.—I don't think it is admissible.

Mr. DAVIS.—I will ask your Honor to admit it for the time being and I will produce authorities, and if I am not right, then strike it out.

Q. You were present there? A. Yes, sir.

Q. And it was right within two minutes after happening, while the man was down in the hold, was it? How long after the man was in the hold?

A. I presume about two or three minutes.

Q. And where was the chief officer when he made this statement?

A. Why, he was just coming right in.

Q. And where was the bos'n?

A. The bos'n was way on the other side of the ship, of the boat.

Q. And who did he make this statement to?

A. Well, he made it in the presence of a friend of mine and myself.

Q. What did he say? Just tell the Judge what he said.

Mr. WARREN.—The same objection, your Honor.

A. He said it was the fault of the bos'n not covering the hatch up.

The COURT.—The fault of the bos'n not covering the hatch up?

Mr. DAVIS.—Surely, if that is not admissible then there is no part of the *res gestae* that is admissible.

The COURT.—I sustain the objection.

Mr. DAVIS.—I ask your Honor to reserve your ruling on it. [41]

(Testimony of Henry Aki.)

Q. Do you know the chief officer of the "Kinau," know that he was the chief officer?

A. I know he was first officer.

Q. Did he have a cap on? A. Yes, sir.

Q. What was on the cap? A. First officer.

Q. He was in uniform at the time on board the "Kinau"? A. Yes, sir.

Q. And you say that this—you are sure it was while the man was in the hold that he made that statement?

A. Yes, sir.

Q. Who was present when he made the statement?

A. Well, a special officer from Kauai. He is in the training camp now.

Q. And yourself? A. Yes, sir.

Q. Cabache, you mean? A. Yes, Cabache.

Q. Valentine Cabache. Have you ever seen the man since?

A. Since I come from the insane asylum?

Q. Yes. A. No, sir.

Q. How wide was this hatch where he fell down?

A. About that wide from here. (Indicating.)

The COURT.—About three or four feet wide?

A. Yes, sir.

Mr. DAVIS.—Were they putting any freight down there then? A. No, sir.

Q. It had been all loaded, eh?

A. Yes, they were loading in the front hatch.

Q. And they didn't put any more freight down in that hatch? A. No, sir. [42]

A. And it was left open there? A. Yes, sir.

(Testimony of Henry Aki.)

Cross-examination of HENRY AKI.

Mr. WARREN.—Did you come out in the same boat to the "Kinau" that Peneyra came on?

A. Yes, sir.

Q. And was his little girl with him? A. Yes.

Q. Did he get out of that little boat before you or after you? A. After me.

Q. And when you got out you went up the stairs or gangway on to the upper deck? A. Yes, sir.

Q. And then did you see him come up—he came up after you?

A. He come after me, but I went to my room.

Q. You saw him up there?

A. I saw him upstairs; yes, sir.

Q. When did you see him upstairs—how long after you had come up yourself?

A. I don't really know; I couldn't say how long, but I think—

Q. Well, five minutes, or what?

A. About five minutes.

Q. And did you see his little girl up on that deck?

A. Yes, sir.

Q. Where was she?

A. She was on the upper deck, on the other side.

Q. Do you know whether Peneyra had a stateroom on the upper deck? [43]

A. No, sir; I didn't see whether he had any stateroom or not, but I knew he had a first-class ticket.

Q. When you saw him on the upper deck what was he doing?

(Testimony of Henry Aki.)

A. I didn't take notice of what he was doing on board.

Q. What part of the ship was he when you saw him up there, what part of the deck?

A. On the left-hand side.

Q. Near the stairway that came up?

A. No, sir.

Q. Where?

A. On the other side. You go through a hallway and it's on the other side of the boat. The ladder was on the right-hand side.

Q. And when you saw him he was on the opposite side of the boat? A. Yes, sir.

Q. And the little girl with him? A. Yes, sir.

Q. And did you watch him and see where he went and what he did? A. No, sir.

Q. The next time you saw him it was after you had been called that there was an accident and you went downstairs? A. Yes, sir.

Q. How did you understand that he went down there to look for his baggage?

A. I saw him looking around for his baggage and he couldn't find it, when he first came up when I got up first.

Q. And when you saw him five minutes or so afterwards was that the time you saw him or did you see him twice up there? [44]

A. Just once.

Q. And that was the time you saw him looking for the baggage? A. Yes, sir.

Q. Did you see him go to the door that leads down

(Testimony of Henry Aki.)

to the next deck? A. No, sir.

Q. You didn't see that? A. No, sir.

Q. When you came on board do you know where the first officer was? A. No, sir.

Q. The first time you saw the first officer was when you had gone downstairs? A. Yes, sir.

Q. Where were you when you heard that there had been an accident downstairs and that you were wanted?

A. I was on the right-hand side of the boat just about a couple of feet away from my room.

Q. How long had you been there?

A. About five minutes, about five or ten minutes; around that time.

Q. And did you hurry downstairs?

A. Yes, sir.

Q. Did they come after you personally or did anybody go that heard of the accident?

A. A Filipino that came up for us, so we went running downstairs.

Q. Now, you say you think the man fell, you say, twelve or fourteen feet?

A. About twelve or fourteen; I don't know. [45]

Q. That is just your best judgment?

A. My opinion.

Q. If the measurement of that hatch would show that it was just eight feet, would you think that the measurement would be more exact *that* your memory?

A. I don't know how deep it is; I just say it is about twelve or fourteen feet.

(Testimony of Henry Aki.)

Q. You looked down in and saw him in there?

A. Yes, I saw him down there.

Q. You say there were no lights?

A. No lights; yes.

Q. Not even electric lights?

A. No; no electric lights on it.

Q. Were there any lights at all in the whole steerage quarters,—the space on the other side of that hatch, were there any lights? A. No lights.

Q. How about the side ports where they take in the passengers and freight on the 'tween-decks there? A. One side,—just half open.

Q. Which side was that?

A. The side he fell.

Q. Was the other side open at all? A. Yes, sir.

Q. Now, how do you fix the time of this accident? You say it was between six and seven o'clock?

A. Well, it was after five when we came on board.

Q. After five? A. Yes, sir.

Q. When you got on board? A. Yes, sir.

Q. Well, what is the best recollection you have of the time you got on board? [46]

A. About six o'clock, I guess.

Q. About six o'clock?

A. Yes, sir, or a little after.

Q. When did the boat finally pull up the anchor and start for Honolulu?

A. Between half-past seven and eight.

Q. Between half-past seven and eight?

A. Yes, sir.

Q. How long do you think it took to send the boat

(Testimony of Henry Aki.)

in with that man and come back again?

A. I don't know; I didn't take the time.

Q. What is that?

A. I don't know; I didn't take the time.

Q. Well, your best judgment; how long do you think it kept the boat back?

A. About an hour, I think.

Q. And to your best recollection this accident happened about how long after you got on board,—five minutes? A. I don't know what time.

Q. Well, your best judgment; I am not asking you to be exact but would you say it was five minutes or fifteen minutes, as near as you can remember, after you came on board?

A. About ten minutes; ten or fifteen, I guess.

Q. Were they still loading freight in the forward hatch at that time? A. I don't know.

Q. You don't know that?

A. I don't know that.

Q. I thought you said a while ago that they were loading [47] freight forward?

A. I didn't say that.

Q. You did not say that? A. I don't think so.

Q. Looking at this hatch in the steerage quarters, is there any low railing or combing around the hatch, or is it right straight off the deck into the hold?

A. There wasn't anything around the hatch; the place was all open.

Q. Weren't there some strips of board there to put the cover on the hatch?

A. I didn't see that, I didn't notice that.

(Testimony of Henry Aki.)

Q. Well, then, you didn't pay much attention to whether they were loading freight into the boat before the accident?

A. In front? I know in the front hatch they were loading up.

Q. Before the accident? A. Yes, sir.

Q. Now, were they loading freight in the front hatches at the time of the accident?

A. I really don't remember.

Mr. WARREN.—That is all.

Mr. DAVIS.—Yes, that's all. [48]

**Testimony of Valentine Cabache, for Libelant.**

Direct examination of VALENTINE CABACHE, for libellant, sworn.

Mr. DAVIS.—What is your name?

A. Valentine Cabache.

Q. What are you engaged in at the present time?

A. I am a student at the training camp.

Q. The officers' reserve camp at Schofield Barracks? A. Yes, sir.

Q. Do you know this man, Adriana Peneyra, that was injured that night on the boat? A. I do.

Q. How long have you known him?

A. I have known him for about four months.

Q. Now, on the night of the 19th, or in the evening of the 19th of December, 1917, were you a passenger on board the steamship "Kinau"?

A. I was.

Q. Where were you coming from?

A. I was coming from Nawiliwili.

(Testimony of Valentine Cabache.)

Q. Where to? A. To Honolulu.

Q. Bound for Honolulu? A. Yes, sir.

Q. Now, did you see Peneyra's ticket that night?

A. I did.

Q. Do you know what kind of a ticket he had?

A. Yes, sir.

Mr. WARREN.—It has already been admitted in the case that it [49] is first class.

Mr. DAVIS.—I know, but what kind of a ticket was it?

A. Yes.

Q. No, what kind of a ticket?

A. First-class ticket.

Q. Were you present at the time he fell down that hatch?

A. I didn't see him actually falling down.

Q. What did you see?

A. I saw him when he was down there in the hold.

Q. Yes.

A. And I saw him when he was taken by the men of the steamer outside and put on the small boat and landed at Nawiliwili.

Q. Yes, and now while he was in the hold did you see anything of the first officer of the vessel?

A. You mean if I saw the first officer there?

Q. Yes.

A. I did; he was around there.

Q. Was he near this place where the accident took place? A. Yes, sir.

Q. Did he make any statement why this man was in the hold?

(Testimony of Valentine Cabache.)

A. I did hear him say something.

Q. How long was that after the man was in the hold?

A. Well, it was about three or four minutes after I came.

Q. What did he say?

A. He said it was the bos'n's fault, that they didn't close the hatch.

Q. Where was the bos'n at the time—

Mr. WARREN.—I move to strike the answer as hearsay and incompetent, your Honor. [50]

The COURT.—I am of the opinion that the testimony is not admissible, but of course I will hear it, and each of you, whatever rights you have in regard to it, when I do rule I will give you the opportunity to except right then.

Mr. WARREN.—I am saving my exception, that is all, your Honor.

Mr. DAVIS.—Now, how long did he remain in the hold, how long before they took him out?

A. From the time I arrived it was just about the lapse of about one minute or a half a minute before they took him out.

Q. And as to lights and so forth there—was that between-decks where he fell down, was that between the upper and lower deck of the hold of the vessel, wasn't it?

A. I don't understand the lower deck.

Q. Well, was it the upper deck, up above?

A. Where the first-class passengers are?

Q. Yes. A. Yes, sir.

(Testimony of Valentine Cabache.)

Q. And this was down between-decks?

A. Yes.

Q. Now, was it light or dark there?

A. I wouldn't say it was light, but it was kind of dim over there.

Q. It was dim? A. Yes, sir.

Q. Dark there, is that it?

Mr. WARREN.—Object to that as leading.

Mr. DAVIS.—Well, was it dark?

Mr. WARREN.—Object to it as leading.

Mr. DAVIS.—How was it as to lightness?

Mr. WARREN.—Same objection, your Honor.

[51]

The COURT.—Which was it, light or dark?

A. More dark than light, I think.

Mr. DAVIS.—Exactly; more dark than light, and did you hear anybody say anything to this man about going into the steerage?

A. No, sir, I didn't.

Q. Did you hear him have any conversation with the bos'n, between Peneyra and the bos'n?

A. I did not, sir.

Q. Now, they brought him up out of the hold, eh?

A. Yes, sir.

Q. Who did?

A. It was a tall Hawaiian fellow and another man; I don't know him.

Q. Exactly; and did you see the condition of his head when they brought him up?

A. It was all bloody.

(Testimony of Valentine Cabache.)

Q. Of course it was; and then where did they take him?

A. They put him in a small boat and landed him at Nawiliwili.

Q. Have you seen him,—did you see him after that?

A. I saw him after that, because I was the one that took him to the insane asylum in town.

Q. You took him to the insane asylum?

A. Yes, sir, I did.

Q. Is he there now? A. I don't know.

Q. But you took him there?

A. I took him there.

Q. Who ordered him committed there?

A. I was present at the trial, and he was ordered by the [52] district magistrate of Lihue to be admitted to the insane asylum.

Q. And you took the *mittimus* and delivered him there?

A. Yes, sir; I was a special police then for the county of Kauai.

Q. Has he got any children?

A. He has one child I know of.

Q. How old is it?

A. About five or six years, to my estimate.

Q. When you got down there in that batch between these decks you say you saw the first officer of the "Kinau"; did you see any sailors of the vessel around there?

A. I saw some men over there who were working for the steamer, or must have been, but I couldn't

(Testimony of Valentine Cabache.)

say whether they were sailors or not.

Q. Yes, and did you see the bos'n?

A. I don't know the bos'n.

Q. Were they loading freight in that hatch at that time? A. I didn't understand you, sir.

Q. Were they putting any freight down in that hatch just before the man fell down there?

Mr. WARREN.—I object to that as incompetent, because he just testified he wasn't there.

Mr. DAVIS.—Putting any freight down, did you say?

A. I didn't see any freight there.

Q. Either before or afterwards?

A. I couldn't state as to before, but while I was there I didn't see any. [53]

Q. And you didn't see any afterwards?

A. No.

Q. Did you come on up to Honolulu on that same trip? A. Yes, sir, I did.

Q. Did you see the captain of the vessel around there at that time?

A. I saw him, yes, sir, I saw him around,—you mean during the trip?

Q. Yes. A. Yes, sir.

Q. Did he say anything about the accident?

Mr. WARREN.—I object, too remote, and hearsay.

Mr. DAVIS.—You were on the upper deck before the accident happened?

A. Yes, sir, I was.

Q. And when you heard about it you rushed down?

(Testimony of Valentine Cabache.)

A. Yes, sir, I did.

Q. Who was it called your attention to it, do you know?

A. A fellow by the name of Pablo Sanches.

Q. Was the man's head badly injured, do you know?

A. I don't know, but it was covered with blood, his head was covered with blood.

Q. As to his condition, it has been suggested—was Peneyra sensible or insensible after the accident?

A. He was unconscious at the time he was taken from the hold.

Q. And what is the depth of that hold about, as near as you can give it?

A. It was quite dark over there, and I can't estimate very well, but I might say that it was about ten feet, I think, [54] ten or eight feet.

Q. And how wide was this hatch?

A. You mean the actual hatch?

Q. The opening.

A. Half of the hatch was covered at that time, and the actual opening must have been about two by five, I think, two feet or three feet by five feet.

Q. You took this man then to the Lihue hospital?

A. No, I did not.

Q. But you helped take him ashore?

A. No, I did not.

Q. But did you see him while he was in the hospital? A. No, sir, I did not.

Q. You didn't see him in the hospital?

(Testimony of Valentine Cabache.)

A. No, sir, I didn't see him in the hospital.

Q. Now, after you brought him to Honolulu after he was declared insane by the district magistrate of Lihue, did you have any conversation with him?

A. I tried to have, but he couldn't understand, and it seems to me as if he wasn't in his proper senses.

Q. He was insane, eh? A. I should say.

Cross-examination of VALENTINE CABACHE.

Mr. WARREN.—You say you have known Peneyra four or five months?

A. Since the accident.

Q. That is all, since the accident?

A. Yes, sir. [55]

Q. Before the accident you don't remember ever having seen him?

A. I am very sure I didn't see him before.

Q. And when did you come on board, the same boat that Peneyra came on or an earlier boat?

A. I came in the boat ahead of Peneyra, I think.

Q. And did you see him come up to the upper deck at all? A. I did not.

Q. You don't know yourself anything about him, you didn't see him in your life before that you know of, except after he fell? A. Yes, sir.

Q. Have you any idea how long it was after the accident happened before you got downstairs to where he was? A. No, sir, I don't know.

Q. Well, a matter of a minute, or two minutes, or three minutes?

A. I can't positively state how many.

(Testimony of Valentine Cabache.)

Q. Well, then, let me ask you this: When you got down there you say it was only about a half a minute more before they got the man lifted up.

A. Yes, sir.

Q. Now, were there men down there already lifting him when you got there?

A. You mean in the hold?

Q. In the hold, lifting him up already.

A. Yes, sir.

Q. Just where did you see him first, down in the bottom there or after he was lifted up in view out of the hatch? [56]

A. First I saw two men in the hatch, in the hold, and one of them was with the fellow who came up the ladder who took him up, lifted him up.

Q. They carried him part way up the ladder?

A. Yes, they lifted him up from the hold.

Q. They had a ladder, you say?

A. I don't remember whether they had a ladder or not.

Q. And when you first saw them did they have the man lifted up off the floor and hand him up when you first saw him?

A. When I first saw him I couldn't exactly state where was he, because it was dark in the hold and I could just see the outline of their being dressed in white contrasting with the darkness in the hold. I could just see their uniforms inside the hold, this man and Peneyra and the fellow who lifted him up.

Q. Now, how long had you been there before you say you heard the chief officer make this remark—

(Testimony of Valentine Cabache.)

you say a half a minute after you got there?

A. I would say two or three minutes.

Q. After you got there?

A. After I got there.

Q. That was two or three minutes after you got down there before the chief officer said that?

A. I didn't hear him make the remark until the man was in the small boat already.

Q. They got him clear out and got him in the small boat before the chief officer said that?

A. Yes, sir.

Q. Now, you say it was dark, or more dark than light; are you [57] referring now to the hatch or down in the hold, or to the steerage quarters?

A. I refer to the steerage quarters; of course the hold is darker than the steerage quarters.

Q. Now, how did you go from the upper deck to get down to the hatch at the lower deck,—just where did you have to go?

A. I went through the stair which runs down by the kitchen and through that hall there leading from that stair directly to the steerage quarters.

Q. Now, let me ask you; you go downstairs. After you get downstairs, did you go straight ahead or turn?

A. I was facing towards that direction when I come downstairs, and then I faced the opposite direction, when I got towards him.

Q. When you got to the bottom of the stairs and faced the opposite direction, had you walked along the passageway there? A. Yes, sir.

(Testimony of Valentine Cabache.)

Q. How far?

A. Till I reached the steerage quarters, I am not very sure now.

Q. Well, ten or twelve feet?

A. More than that; it must have been about twenty feet.

Q. When you got to the end of the passageway is there a door between that passageway that opens from the passageway into the steerage quarters?

A. I don't remember whether there is a door or not, but there was an opening; there was an opening leading to the steerage [58] quarters.

Q. A doorway? A. Yes, sir.

Q. You say when you got there there were some men working on the opposite side; you don't know whether they were sailors or not?

A. I didn't say they were working on the other side.

Q. Oh, what were they doing?

A. When I went down there they were all crowding around there.

Q. Did you see any signs there as though they had been working over there, any freight around?

A. I did not, sir.

Q. Was there any freight on the deck there around that hatchway, any freight piled up?

A. I don't remember; I just remember that there were people piled up around there; some were lying down already, steerage passengers laying down.

Q. But you don't remember seeing any freight or obstructions around the hatchway?

(Testimony of Valentine Cabache.)

A. No, sir, I did not.

Q. Now, how about the doors that opened out, the doors that opened at the side of the ship from the deck, were they opened or closed, any of them?

A. The port doors, you mean?

Q. Yes; were they open on the side of the ship to take freight in and out?

A. Yes, they were open on both sides.

Q. How big an opening?

Q. Probably ten feet by ten feet. [59]

Q. What time of day was it?

A. In the evening.

Q. About what time?

A. Between five and six, I think; I am not very sure.

Q. Were there any artificial lights, electric lights between-decks?

A. I don't remember if there were lights then or not.

Q. Any light coming in through the openings on the side, any daylight?

A. Yes, sir; it was still clear outside.

Q. Well, when you went down could you see well enough to see where you were going? You came downstairs and went along a little passageway and went through a doorway where you could see the hatch; was it light enough to walk around there to see where you were going?

A. Well, from the upper deck till I reached the lower deck it was clear enough for me to look in there, but when I arrived at the steerage quarters

(Testimony of Valentine Cabache.)

I didn't notice,—I mean I couldn't distinguish whether the hatch was closed or not.

Q. Well, you say you saw it partly open; you say it was two or three feet wide.

A. When I looked down I saw these men; I saw this man and two forms down there, as I stated before, their clothing contrasted with the darkness in the hold and I could easily see them in the hold.

Q. You haven't seen this man Peneyra since you took him to the hospital? A. No, sir, never did.

Mr. WARREN.—That is all. [60]

**Testimony of Pablo Sanchez, for Libelant.**

Direct examination of PABLO SANCHEZ, for libellant, sworn.

Mr. DAVIS.—What is your name?

A. Pablo Sanchez.

Q. Where do you reside?

A. Schofield Barracks.

Q. Did you know Antalio Peneyra?

A. Yes, I know him on the steamer on the day, December 19, 1917.

Q. Was you a passenger on the "Kinau" on that day? A. Yes, sir.

Q. Where were you coming from?

A. I came from Kona side, about three o'clock in the afternoon.

Q. Did you see the accident that happened to him?

A. Yes, sir.

Q. On board the steamer, where was it?

A. Nawailiwili, on "Kinau" steamer.

(Testimony of Pablo Sanchez.)

Q. Where were you when he fell down the hold—did anything happen to him?

A. Yes, he fell down through the hatch.

Q. Where were you at the time?

A. I was there on the steamer at that time.

Q. Standing near him?

A. Yes, I was standing near him.

Q. Just tell the Court how it happened without any leading from me.

A. Well, the second officer told him to move back a little further because they were loading crates of chickens. [61]

Q. Did he shove him?

Mr. WARREN.—Objected to as leading.

Mr. DAVIS.—What did he do to him at the time?

Mr. WARREN.—Objected to as leading.

A. I believe he was much excited and he moved back and right at the same time he fell inside the hatch.

Mr. DAVIS.—Did the officer do anything to him before he fell in that hatch?

Mr. WARREN.—Object to that as leading.

The COURT.—I don't think that is leading; answer the question.

Mr. DAVIS.—What did the officer do to him at the time?

A. No.

The COURT.—You asked him did he do anything to him at the time.

Mr. DAVIS.—Where was Peneyra standing with

(Testimony of Pablo Sanchez.)

reference to the hatch when the officers told him to step back?

A. It's about six feet far from the hatch.

Q. How did he have his hand when he told him to move back?

A. He kept his hand like that, and said, "Move back, you fellows."

Q. Was Peneyra's back to this hatch there?

A. About two steps back; then he fell inside the hatch.

Q. Was his back to the hatch, or his face?

A. Back to the hatch.

Q. And he did move back?

A. He did move back, about two feet backward.

Q. Did you hear any person order Peneyra to go down to the steerage?

A. Yes, the second officer told him to go back, because the [62] second officer ask him if he know how to talk English, or can he understand what the officer said, and the officer told him to go down, and he went right straight down and carried his bag with him right where I stayed, and after that the officer told me to explain to all these boys that any passengers that had tickets must stay here and wait for purser.

Q. He ordered him back; was he trying to get upstairs then?

A. No, he just moved back about two steps and fell inside the hatch.

Q. Well, was Peneyra trying to go upstairs, or what was he doing?

(Testimony of Pablo Sanchez.)

A. He been upstairs already.

Q. Was he trying to come back?

A. Officer told him to get back because they was bringing on some crates of chickens, might get hurt, and as the officer told him move back he moved two steps back and at the same time fell in the hatch.

Q. Where was the crate of chickens—in front of him? A. In front of him.

Q. How far from him?

A. From here to the corner of that table.

Q. Now, how was it there—was it light or dark there? A. It was awful dark.

Q. And it was when the officer gave that command to move back that he fell down the hatch?

A. Yes, sir.

Q. How far did he fall—what's the distance as near as you can judge, how deep was it? [63]

A. I think it must be as high as this; I think from that side, I think.

Q. How many feet?

A. About sixteen or fifteen feet, I think.

Mr. WARREN.—Pointing to the top of the green wall, are you?

A. No, to the light.

Mr. WARREN.—I should say that would be about twelve feet, your Honor.

Mr. DAVIS.—About twelve feet there.

The COURT.—Estimate it in feet, how many feet would you say he fell.

A. I don't know how many feet it was, and I understand it was as high as that.

(Testimony of Pablo Sanchez.)

Mr. DAVIS.—Now, with reference—I want to find out, I don't know whether it's clear to his Honor, Judge Vaughan, or not, about this ticket business. Did the purser—he told them they would have to stay there until the purser collected the tickets?

A. Yes, the second officer told him to stay there until the purser collected the tickets, and he did so, and after that he ordered him to move back, by the second officer.

Q. Yes, but in the first place he ordered them to stay there between-decks and not to go upstairs until the tickets had been collected? A. Yes, sir.

Q. And now is this the place for the first-class passengers down there, or the second?

Mr. WARREN.—Objected to that, your Honor, as immaterial. [64]

The COURT.—Did the man have a right to be where he was, is there any dispute about that?

Mr. WARREN.—No.

The COURT.—Overrule the objection; I will admit the testimony. Read the question.

(Last question read.)

A. That was the third-class passengers' place.

Mr. DAVIS.—And who ordered this man Peneyra to stay there?

A. The second officer.

Q. Yes, and then he ordered him back?

A. Yes, told him to move back.

Q. And it was then that he fell?

A. Yes, in the hold.

(Testimony of Pablo Sanchez.)

Q. Were you present when the man was taken up out of the hold? A. Yes, I was present there.

Q. Just describe his condition without any leading from me, how was he.

A. From what I understand he don't know anything, just like dead, blood coming out from his nose and mouth and from his ears and also from his head.

Q. Was he conscious or unconscious?

A. Unconscious, you know, he don't know anything; couldn't talk, and he couldn't do anything; just like dead.

Q. Who took him ashore?

A. Well, the boys working on the steamer, the crew.

Q. Did you help? A. No, I didn't help.

Q. Did they take him ashore in a small boat?

A. Yes.

Q. Did you see him afterwards? [65]

A. No, I went right straight to Honolulu.

Q. See him here in the insane asylum?

A. No, I didn't visit it.

Q. And that's all you know about it? A. Yes.

Mr. DAVIS.—That's all.

Cross-examination of PABLO SANCHEZ.

Mr. WARREN.—Were you a third-class passenger? A. Yes, sir.

Q. When did you go down in the steerage quarters?

A. I went down on three o'clock from Kona landing and went right straight to Nawiliwili landing

(Testimony of Pablo Sanchez.)

and reached over there about five o'clock or half-past five.

Q. No, I asked you when did you go into the steerage quarters? A. The December 19th?

Q. Yes. A. 1917.

Q. No; when you went on board the ship that time— A. Yes.

Q. —where did you go first?

A. I go right straight to third-class place.

Q. To the third-class quarters? A. Yes.

Q. You were a third-class passenger, were you?

A. Yes, sir.

Q. And you waited there all the time?

A. Yes, I staying there all the time. [66]

Q. Where were you standing?

A. Just walking all around there, on the third-class place.

Q. And they were loading freight in there?

A. Loading freight and some mails and crates of chickens and all other things.

Q. Taking it in through the side of the ship?

A. Yes, taking it in through the side of the ship.

Q. And what were they doing with it,—were they putting it down in the hold or putting it on deck?

A. No, just put the mail inside the hold and these boxes and crates of chickens they put outside.

Q. Around the hatch?

A. Way behind, far from the hatch, about six or seven feet away from the hatch.

Q. And how large an opening was there in the hatch?

(Testimony of Pablo Sanchez.)

A. About from this side to that place over there, halfway open, you see.

Q. About six feet long?

A. From this place to that post.

Mr. WARREN.—About six feet, your Honor, or seven feet?

The COURT.—Yes, about seven feet.

Mr. WARREN.—And how wide?

A. From this place to this place here.

Q. That is about nine or ten feet?

A. Yes, I think so.

Q. Where were you when Peneyra came to the steerage quarters the first time, did you see him come down? A. Yes.

Q When he came, did he come through the door? [67]

A Yes, because the second officer told me to advise all these passengers who come to the steamer to stay where they are till the purser take their tickets, and I told these boys to stay where they are and wait for the purser to take their tickets.

Q. Did you tell Peneyra?

A. I told Peneyra to stay where you are and wait for purser.

Q. Did you tell it to any of the boys before Peneyra came down? A. Yes.

Q. You told it to each one as he came in?

A. Yes.

Q. Where did they stay?

A. In the same place.

Q. All in the same place? A. Yes, sir.

(Testimony of Pablo Sanchez.)

Q. How far from the hatch?

A. Well, all around, you see?

Q. All around the hatch?

A. All around the hatch.

Q. And where was Peneyra when you told him?

A. He was near the hatch, you see, about three or four feet from the hatch.

Q. Now, was he on one side of the hatch, or back of it, or in front of it?

A. In front of the hatch.

Q. In front of the hatch? A. Yes, sir.

Q. In front, toward the front end of the boat?

A. In front of the hatch; you see, the door open here, one hold where we pass cargoes, you see, he was facing to that place, and back to him was the hatch.

Q. How long had he been in there before the accident? [68] A. You mean how long I been?

Q. No, after he came in there, before the accident.

A. Not very long; I think about fifteen minutes.

Q. He was there fifteen minutes?

A. Yes.

Q. Did he stay in the same place or walk around?

A. Same place.

Q. Move around with the other Filipinos?

A. No, he didn't move, right in the same place.

Q. What way was he facing on the ship, toward one side, or the front, or toward the back?

A. Toward one side of the ship.

Q. Then was he on one side of the hatch?

A. Yes, because the hatch is square like that, you see, and this hold over here on the side of the ship,

(Testimony of Pablo Sanchez.)

and he was facing like that, and one side of the hatch was open like that, you see.

Q. Which side of the ship was he looking towards?

A. Looking left-hand side.

Q. And he was on the left-hand side?

A. Yes, he was on the left-hand side.

Q. Where did that crate of chickens come from? Did they take it through the port?

A. Yes, just like this, small hole, and they take these crates of chickens with the cargoes throwing the chickens up on the steamer.

Q. And they put the mail in there too?

A. They put the mail in the hatch, but the chickens outside.

Q. When did they put the mail in, before or after the chickens? [69] A. Before chickens?

Q. Accident, I mean, before or after the accident?

A. Before the accident.

Q. Now, you say the man you call the second officer made a motion to go back.

A. Yes, he told him to get back, like that, and he give him the motion.

Q. Did he say why?

A. He didn't say why.

Q. Did he say on account of moving the chickens?

A. He might mean that, but he said get back.

Q. But everybody could see that they were moving crates of chickens? A. Yes.

Q. When he made that motion to get back was he talking to any particular person or anybody who happened to be too close?

(Testimony of Pablo Sanchez.)

A. He was just talking to me, the second officer was talking to me.

Q. He made the motion to you to get back?

A. Yes, he give me the motion, and after that he told me to explain to these boys who didn't understand that, to move back on account might get hurt.

Q. Did you explain to him?

A. Yes, to some of the boys.

Q. Did you explain to Peneyra?

A. No, I didn't tell anything to Peneyra, because at the time he saw the motion to move back and he moved back already.

Q. And after he moved back then you explained to the others, [70] is that right?

A. I explained before Peneyra fell in the hatch, and I explained to the rest of the boys not to be near to that hatch, might get hurt or something else.

Q. You made that explanation to the other boys before the accident, that the man told them to get back, and you explained to them to get back?

A. Yes, I explained to rest of the boys before accident happened, and after that Peneyra moved back and at the same time he fell in hatch. I had no time to explain to Peneyra because he was in the hold already.

Q. You had already explained to the other boys?

A. Yes, sir.

Q. Were any of the other boys nearer the hatch than Peneyra, he the nearest?

A. He was nearest boy.

Q. And did you see him when you explained to

(Testimony of Pablo Sanchez.)

the other boys, was he there?

A. He was there.

Q. How far away from you?

A. Two feet or three feet; like that.

Q. Did you talk in a voice loud enough for the other boy to hear you?

A. I was little further away from him, but he was standing with his baby and hold baby in his hand.

Q. He held a baby in his hand? A. Yes.

Q. How old was the baby?

A. Well, about six or seven years old. [71]

Q. Did he carry it up in his arms?

A. Like that, baby standing, he was sitting down, you see, and hold baby like that, and baby standing up.

Q. Who was sitting down? A. Peneyra.

Q. Holding the baby? A. Yes, holding baby.

Q. And she was standing up?

A. Baby was standing up.

Q. When did she come down there, same time he came?

A. Yes, they come together at the same time.

Q. Did you have any talk with him at all before the accident? A. No.

Q. You did not say anything to him?

A. No, I didn't say anything to him.

Q. You don't know why he came down there?

A. No.

Q. How long was it after the man you call the second officer made that motion to get back, how long after he made that motion and said that did you ex-

(Testimony of Pablo Sanchez.)

plain to the other boys about getting back?

A. The time the second officer gave sign like that and tell me to explain to the rest of the boys and I move outside and talk to rest of the boys, and not very long after that I hear Peneyra fall in hatch already so I didn't finish all my explanation and I run where Peneyra fall down, and on account of my excitement I run upstairs and call two officers from Lihue which was on the steamer "Kinau."

Q. When you explained to the boys to get back did you call out loud enough for the men around there to hear you? A. Yes, I do. [72]

Q. Were any of these boys further away from you than Peneyra, or closer?

A. I was little further from Peneyra, and rest of boys near to me.

Q. A couple of feet further?

A. Oh, about from this side to that third chair over there.

Mr. WARREN.—Ten feet, your Honor?

The COURT.—Twelve feet, or fourteen.

Mr. WARREN.—You didn't call to him at all?

A. You mean Peneyra, sir?

Q. Yes. A. No.

Q. You did not try to warn him to get back?

A. No, sir.

Q. Was it as much as a half a minute from the time the officer gave that order and made that motion, as much as half a minute before Peneyra fell down?

A. Well, the moment the second officer give the

(Testimony of Pablo Sanchez.)

sign and give motion to move back, he stand up and move back, and right about two steps back he fall right in hatch. I don't know how many minutes or seconds he went down.

Q. No lights in there, you say?

A. There is no light.

Q. No electric light, you mean?

A. There is electric light, but not lighted.

Q. Not lit? A. Not light.

Q. And what time of day was this accident?

A. It was between five and six o'clock.

Q. Was it light or dark outside?

A. Well, it is not very light, but more dark than light. [73]

Q. When was it that you explained to Peneyra that the officer wanted him to wait there until his ticket was taken up—how long after he came in?

A. About fifteen minutes.

Q. About fifteen minutes after he came in before you told him?

A. Second officer tell me to explain to all boys to wait for purser to collect their tickets, so I go all around to these boys and tell them they don't have to go moving but wait for purser to get your tickets, and I met Peneyra right near the hatch sitting down and I tell him wait for purser, about fifteen minutes.

Q. Peneyra had been there fifteen minutes before you told him?

A. Yes, before I told him,—no,—

Q. Did you tell him as soon as he came down?

A. Soon as he come to steamer tell him to stay

(Testimony of Pablo Sanchez.)

same place where he was and wait for purser to collect ticket.

Q. How did Peneyra get to that place—through the door or through the side of the ship?

A. Through side of ship.

Q. Did you see him come in? A. Yes.

Q. Did you see him come off the ladder into the side of the ship? A. Yes.

Q. Did the little girl come with him right through that place?

A. Yes, Peneyra holding little girl by her hand.

Q. Did he have any baggage?

A. No, he didn't have any baggage.

Q. When he came he didn't have any baggage?

[74] A. No.

Q. You saw him yourself come up the steps and go through the side of the ship? A. I did.

Q. Well, did Peneyra go to the upper deck at all?

A. I didn't see him to go to the upper deck.

Q. Well, you don't know?

A. Well, I don't know.

Q. He may have gone out of there and then come back.

A. I didn't see him go around; just the time I saw him go up the stepladder and go in the hole and go right straight in, and I talked to him on the deck to stay the same place where you are now, and he just walk around and sit down near the hatch and right in the same place, and he stay, and about fifteen minute later officer give sign to move back all the fellows staying near Peneyra because they might

(Testimony of Pablo Sanchez.)

get hurt on account of all this crews throwing mails and chickens on the steamers.

Q. All right; when he came on, where did he go, as soon as he got inside the ship off the ladder, where did he go?

A. He walked around like that and sit down near the hatch.

Q. When did you speak to him, before he sat down? A. Before he sit down.

Q. How far did he walk after you told him?

A. Not very far; he just walk around like that, you see, from the hole where we used to pass going inside the steamer and he go right like that.

Q. He walked around the hatch to the other side?

A. To the other side here. [75]

Q. And where you told him was right where he came on board?

A. Yes, when he come on board ship.

Q. What did Peneyra look like?

A. He is old man.

Q. How old?

A. Well, I don't know how old he is.

Q. Can you describe him at all?

A. Well, he got his face wrinkled.

Q. What else?

A. And on this side here he got no teeth.

Q. On the right side no teeth? A. Yes.

Q. Now, from the time he came in you told him to stay where he was and he walked around the hatch and sat down? A. Yes.

Q. Did he move away from there after that?

(Testimony of Pablo Sanchez.)

A. No, sir.

Q. Then you will swear he was not up on the upper deck at all? A. I didn't see him go on upper deck.

Q. Well, do you say he did not move from there after he sat down there, he stayed there?

A. He stayed there.

Q. Did you see him there all the time?

A. I saw him until the time he fall down in the hatch.

Q. All up to that time you saw him there?

A. Yes, sir.

Q. Did his little girl go upstairs at all or stay with him all the time?

A. Yes, she stay with him until the moment until the old man fall down in the hold. [76]

Q. Did Peneyra go walking around asking questions about anything?

A. I didn't see him walking around and asking anything of anybody.

Q. Did you hear him ask questions of anybody about anything? A. No, sir.

Q. He stayed right in one place?

A. He stay right in the same place where he are.

Q. Did he talk to anybody near him that you know of?

A. No, because he didn't talk them kind of languages; he talk his own language; no fellow on the steamer who could talk his language.

Q. Any Filipinos?

A. Yes, he got different dialects.

(Testimony of Pablo Sanchez.)

Q. Did Peneyra say anything to you about his ticket?

A. No, he didn't say to me anything about his ticket.

Mr. WARREN.—That is all.

Mr. DAVIS.—I want to have entered here on the record that it is admitted by the third paragraph of the answer that the claimant further admits that it is a common carrier of freight and passengers by water, within the jurisdiction of this Honorable Court; also that it appears by the first paragraph of the answer that the libellant, Anatalio Peneyra, named on his passage ticket as—purchased a ticket, a first-class passage on said steamship "Kinau" on or about the 19th of December, 1917, from Nawiliwili to the port of Honolulu, and was carried and received on board said vessel as such passenger, that is as far as the admission goes there, was carried to and received on [77] board said vessel. I want that to appear in the record. [78]

*In the United States District Court, in and for the Territory of Hawaii.*

AD. 172.

ANATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Boats, Furniture and Appurtenances,

Libellee.

Honolulu, H. T., April 23, 1918.
2:00 P. M.

Mr. WARREN.—Perhaps I should have stated, your Honor, I understand from Mr. Davis that he has still some proof he wishes to put in and close his case, but that the defense will now go on.

Mr. DAVIS.—All the proof with reference to his injury is now in, except that I may have some rebuttal testimony.

The COURT.—Yes, that is all right; go ahead. [79]

**Testimony of John Wailiula, for Libelee.**

Direct examination of JOHN WAILIULA, for libellee, sworn.

Mr. JAMES HAKUOLE, sworn as Hawaiian interpreter.

Mr. WARREN.—(Through Interpreter.) Where

(Testimony of John Wailiula.)

were you working on December 19th last,—were you an employee of the steamship "Kinau"?

A. On "Kinau"; yes, sir.

Q. What is your position on the crew?

A. Bos'n.

Q. Do you remember the time an accident happened to a Filipino who fell into the hatch in the after-hold there? A. Yes, sir.

Q. Where was that, where was the steamer at the time? A. In Nawiliwili.

Q. What were you doing and where were you at the time of the accident?

A. On a certain corner near the hatch.

Q. What deck?

A. That is where the deck passengers usually stay.

Q. Is that called the steerage? A. Yes.

Q. Now, did you have anything to do with helping to get the man up out of the hatch after he had fallen in? A. Yes.

Q. What did you do?

A. I helped him get out of the hold, he being at that time,— [80] he was being lifted out by two other men in the hold, and I was on top and lifted him out of the hold.

Q. When did you first see that man that day?

A. By the gangway.

Q. Tell us about that, what was he doing?

A. He and the others had just got out of the boat and was walking along the gangway when I saw him, and he was going up.

Q. Now, after he got out of the boat and got on the

(Testimony of John Wailiula.)

gangway, where did he go?

A. He was going up to the cabin.

Q. Upper deck? A. Upper deck.

Q. When did you next see him after that?

A. I next saw hiw in the hold, he having fallen down.

Q. Now, just before that accident happened, what were you doing?

A. I was clearing the steerage so as to get the trunks and other packages out of the place.

Q. Out of what place?

A. Oh, so that the packages in the boat could be lifted there on to the steerage.

Q. Where was the boat?

A. The boat was on the port side of the steamer.

Q. And where were these trunks and other baggage to be put in?

A. Oh, these were packages which were brought from shore and on the boat were to be taken out of the boat and in to the hatch where this Filipino had fallen.

Q. Now, when you refer to the boat there, do you refer to the small boat that goes between the shore and steamer, the [81] freight boat? A. Yes.

Q. Now, in transporting the trunks and baggage from that small boat into the steamer and into the hatch, you say, on the port side, just how is that done from the boat to the hatch, how do they do it?

A. After we had gotten the passengers out of the boat and into the steamer I told the steerer of this small boat to change his location from that on the

(Testimony of John Wailiula.)

port side to the other side.

Q. The port side to the other side or the gangway side to the port side—which?

A. Oh, the boat first left the landing for the steamer and this little boat reached the steamer and stayed on the right side of the steamer. After the passengers had gotten on the steamer I told the steerer of the boat to go to the left side of the steamer preparatory to transferring these packages on the steamer.

Q. When the boat got around to that side of the steamer to transfer the packages, then how are the packages transferred from the boat to the steamer?

A. After we had got on to this side of the steamer I gave the order to lower the plank, to lower the plank, and I told the boatman to transfer the packages in the boat on to this plank and from there on to the main steamer.

Mr. WARREN.—Do you mind if I lead there a little to get at this plank business?

Mr. DAVIS.—No. [82]

Mr. WARREN.—Is that the platform or staging that leads out from the steamer?

A. This plank I refer to is commonly known by us —is commonly called the stage support held up by ropes on both sides of the stage.

Q. How far below the floor of the steerage deck is that staging?

A. It is a distance of from the top of this railing to the foot of it.

Mr. WARREN.—About three feet six or four feet.

(Testimony of John Wailiula.)

Q. Now, referring to the hatch inside where this man fell, is there any kind of a railing or guard around that hatch?

A. Yes, there is a sort of a chain around the hatch.

Q. How high from the deck?

A. It is the height from here to here.

Mr. WARREN.—Say about thirty inches.

Q. Now, at the time of the accident was there any such chain as that on the port side of the hatch?

A. No, it had been taken.

Q. Taken? A. Taken down.

Q. When had it been taken down?

A. At the very time I gave the order to transfer the packages into the hold, the hatch.

Q. Who took it down? A. I did.

Q. And what were the men down in the boat doing, if anything, with the baggage or trunk, at the time that accident happened?

A. When this accident occurred none of the packages in the boat [83] had been touched or taken or transferred.

Q. Well, what were the men doing down in the boat?

A. The crew in the boat was simply getting ready for the order to transfer the packages, but in the meantime the accident had occurred. When they heard of it they came to the rescue.

Q. Yes. Now, you said that you had given orders or tried to clear the way for a passage in there for this baggage. How did you do that,—what did you do?

(Testimony of John Wailiula.)

A. I told them to clear the way verbally, the people.

Q. Who did you tell?

A. I told the deck passengers.

Q. At that time did you see this Filipino that fell right afterwards, did you see him at the time you asked the people to clear the way? A. No.

Q. To whom did you address that remark or request, to any particular person?

A. I gave that order to all who were present, the deck passengers.

Q. What distance is it from the hatch to the port door in the side of the ship?

A. From the—from this ewa railing of the witness-stand to the Court.

Mr. WARREN.—I should judge that to be from that railing to your Honor, say ten or twelve feet—no, ten feet.

Q. Besides asking or ordering the people to clear the way, did you do anything? [84] A. No.

Q. Did you make any signals or motions?

A. I simply motioned this way, telling them to clear the way, but I didn't actually touch them.

Mr. WARREN.—Witness makes a motion of separation with his arms.

Q. Now, immediately after you made that motion and asked them to clear the way, what did you do?

A. While I was making these motions of separation to the deck passengers, this man in question fell into the hatch, and I immediately went to help him.

Q. Did you see him fall? A. No.

(Testimony of John Wailiula.)

Q. Then how soon after you made that motion—well, I withdraw that. If you did not see him, where was your attention directed at that particular time?

A. My attention was directed to the deck passengers to whom I was addressing to clear the way.

Q. How far from where you were standing at that time was it to the place where the man fell in?

A. It was only two feet distance and the Filipino was in my rear.

Q. Oh, which way were you facing at the time he fell, the end toward the ship or toward the door looking out of the ship?

A. My attention was directed to the hold where the packages were to be transferred on the left side of the steamer.

Q. Was there any crate of chickens being handled there at that time? A. No, none. [85]

Q. Was there anybody—do you know whether there was anyone with this Filipino man at the time of the accident?

A. No, I couldn't say as to that because there were too many people there.

Q. Do you remember anything of a little girl going ashore with him afterward?

A. No, I didn't see the little girl, but I was told that she went ashore in another boat.

Q. After the accident and you had assisted in getting the man out of the hatch, what did you do with him?

A. We placed him in the boat and took him ashore.

(Testimony of John Wailiula.)

Q. What boat?

A. Into the boat where Pua was in charge of; Pua is downstairs.

Q. Is that the same boat or different from where the trunk was? A. It was the same boat.

Q. Now, do you know anything of any order or direction having been given to that Filipino man to stay in the steerage or to go or not to go any particular place? A. No, I do not.

Q. What about taking up their tickets,—is there any rule about that in the steerage?

A. The purser has charge of that matter.

Q. Well, do you know anything about that?

A. No, I do not.

Q. Now, at the time that accident happened did you pay any attention to the time of day, where the sun was?

A. I know it was afternoon, but I could not say as to what hour of the day. [86]

Q. Well, what about the sun,—did you pay any attention to where that was?

A. The sun was directly over the Pali, precipice near there.

Q. Could you see it, or had it gone behind the Pali?

A. No, the sun was visible at that time, just directly above the Pali.

Q. Now, can you give us an idea how high that Pali is compared with,—well, say Diamond Head or Punch Bowl?

A. Diamond Head and Punch Bowl are much

(Testimony of John Wailiula.)

lower than this Pali I have reference to.

Q. How far into Nawiliwili Bay was the "Kinau" lying at anchor at that time?

A. It was at some considerable distance from the beach but I couldn't say exact.

Q. Well, was it at the usual anchorage?

A. Yes.

Q. Now, how long did it take to get the man up out of the hatch and down into the boat?

A. It was less than five minutes; not quite five minutes.

Q. Now, at the time that accident happened, in that steerage hall was it light or dark?

A. It was light.

Q. Well, how light?

A. I think something like this, as light as this, because the sun had not disappeared beyond the hill, beyond the Pali.

Q. As light as this—you are meaning the light you see out of the windows now? A. Yes. [87]

Mr. WARREN.—Your Honor, may the record show that it is three forty-five at this time?

The COURT.—Yes.

Mr. WARREN.—Now, how long did it take, if you know, from the time the boat left the steamer with this man until it got to the landing?

A. It didn't take us ten minutes to reach the landing. There were four of us in the boat rowing and I was one of them.

Q. When you got ashore, what was done with him, did you notice?

(Testimony of John Wailiula.)

A. We lifted this Filipino out of the boat into an automobile and he was taken away.

Q. Now, coming back to the hold of the steamer where this accident happened, I want to ask you how big this port door is where this trunk and baggage was to come in, how wide open was that?

A. It is a big hole; the hole itself is a large one but there were two shutters to it.

Q. I am not speaking of the hatch, I am speaking of the doorway. Just compare it with that door behind you.

A. The width of that hole is about the same as from here to—about the size of that door.

Q. And how high—about the same?

A. Perhaps as high as this, but a man standing up straight couldn't pass through that hole unless he bent down a little.

Q. An ordinary man would have to stoop his head to go through? A. Have to stoop down a little.

Q. Now, you say there are two doors to that; is that right? [88] A. Yes.

Q. And how many of these doors were open?

A. These two doors were open.

Q. Now, on the other side of the ship what is there over there in the way of a door—I mean right opposite?

A. Yes, there is another hole about the same size, but that is reserved for the passengers.

Q. Yes, now was that open or shut?

A. Well, that door was shut after the passengers had gotten onto the steamer.

(Testimony of John Wailiula.)

Q. At the time of the accident was it open or shut?

A. It was being shut.

Q. Well, can he tell us whether it had been shut or was just going to be shut or actually being shut at the time? A. No, it was just being shut.

Q. Now, any electric lights in that steerage quarters? A. Yes.

Q. Were they lit or not?

A. I don't know about it.

Q. Who has charge of that deck in there?

A. I have charge.

Q. Well, how could you see them inside of that place at the time the accident happened?

A. Everything in this compartment could be seen easily excepting the rear portion of the storage, cold storage.

Mr. DAVIS.—What can be seen?

A. Anything in that compartment can be seen easily except the rear portion of the ice storage.

Mr. WARREN.—Was this Filipino man anywhere near that ice [89] storage place?

A. No.

Q. How far is it from that ice storage place to the place where this accident happened?

A. From that mauka waikiki post of the bench of the Court there to perhaps this corner.

Mr. WARREN.—What would you call that, your Honor, thirty-five feet?

The COURT.—I should think it would be about thirty.

Mr. WARREN.—Now, how far is this place where

(Testimony of John Wailiula.)

the Filipino had fallen into the hatch, to that open port door?

A. From where I am sitting to the Court, to where the Judge is sitting.

Mr. WARREN.—That is about what, your Honor?

The COURT.—About ten feet.

Mr. WARREN.—Oh, after that accident did you see the second officer around there anywhere?

A. The second officer had gone ashore at that time.

Q. Well, did you see any other officer of the ship in there right after the accident? A. Yes.

Q. What is his name? A. Kui.

Q. What is his position?

A. He is the third mate; it is a Hawaiian.

Q. Was he there, Kui?

A. Yes, he came there after the accident.

Q. Do you know a man named Otterson?

A. Kui, the third officer was at the bottom of this hold, of [90] the hatch, and the second officer whose name you mentioned there,—

Q. Otterson? A. Was on top.

Q. The first officer or the second officer?

A. The mate, he was on the main deck.

Q. Now, did you see Otterson right after the accident? A. Yes, sir, I did.

Q. Do you know whether Kui, whom you say was the third mate, was wearing a third mate's cap, or what kind of a cap, did you notice that?

A. Yes, he was wearing his officer's cap.

Q. Did you notice particularly that cap?

(Testimony of John Wailiula.)

A. Yes, he was wearing a black cap with his insignia in front in gold.

Q. Just his mate's cap; you did not read that cap particularly at that time? A. No, I did not.

Q. Now, right after that accident, did you hear any remarks made by any officer of that ship as to whose fault that was, that accident?

A. The mate gave me a scolding.

Q. What did he say?

A. He said I was careless, negligent.

Q. In what way?

A. Careless in not looking after the hatch.

Q. Well, what more did he say?

A. That's all he said and then he went away—I went away.

Q. When did he say that? [91]

A. After the accident occurred, while we were helping the Filipino out of the hatch.

Q. Where had the mate been just before that?

A. He was standing up on the gangway looking down, watching what I was doing.

Q. Where were you?

A. I was at the foot of the gangway.

Q. Was this before or after the accident?

A. This was before the accident occurred.

Q. Was it while the passengers were coming on board or was it before they went around to the opposite side or aferwards?

A. We were in that position at the time when the passengers on the boat—when the passengers were changing places from the boat to the steamer.

(Testimony of John Wailiula.)

Q. Yes, so that after the passengers had come aboard the steamer and the boat had gone to the other side to take out the trunk and baggage, then where was the first officer?

A. Then the first officer came down to see what I was doing, what I was doing with these trunks and baggages.

Q. Was that before the accident?

A. This was before the accident happened.

Q. Now, was the first mate there at the time the accident happened? A. Yes.

Q. At the time the accident happened?

A. I don't know whether the first mate was present at the scene of the accident, but what I do know is that he was [92] heading that way; he was coming towards that place when the accident happened.

Q. Then you mean he was in the steerage quarters? I am not talking about Kui at all; I am talking about Otterson. A. Yes.

Q. Then you say that Otterson was in between-decks there at the time of the accident?

A. Otterson, the first officer, was at the top of the gang-plank after the passengers had come aboard.

Q. Yes.

A. After they came aboard he went downstairs and came towards where I was standing.

Q. Yes.

A. And before he got to where I was standing, the accident happened.

Q. So that to your recollection he was in the steerage quarters at that time, is what I want to know.

(Testimony of John Wailiula.)

A. Yes, that is the best of my recollection he was there.

Q. Where was Kui?

A. Kui was in front when he heard of the accident and rushed back in a hurry.

Q. In front where?

A. Fore hatch; that is where he was.

Q. Is that the same part of the ship or is it hidden from sight of the after part of the ship?

A. Hidden by the side of the boat.

Q. Was it the upper or lower deck where he was?

A. He was on the upper deck. **[93]**

Q. Now, when you took that chain down from the port side of the hatch, where was Otterson?

A. He didn't come there at that time; he hadn't got there.

Q. Had he gotten into the steerage quarters—was he in the steerage quarters when you took down the chain? A. No.

Q. When he came in what is the first thing he did?

A. He gave me a scolding for my action towards taking out the chain around the hatch.

Q. Was that before the accident happened or after the accident that he gave you the scolding about the chain?

A. My recollection is that as soon as he got to where I was standing and saw this chain unloosened the accident immediately happened followed by the scolding—then he give me the scolding.

Q. I want to find out when this scolding was—before or after the accident.

(Testimony of John Wailiula.)

Mr. DAVIS.—It has already been asked and answered, after the accident. I object.

The COURT.—Overrule it; I want to understand it.

A. This scolding happened before the accident.

Mr. WARREN.—How long before?

A. Very shortly before.

Q. How much time passed between the time you took the chain down and the time the accident happened?

A. If I am not mistaken it must have been two or three minutes.

Q. Now, I understood you to say that after he gave you the scolding he went away and you went away. Now, what do you mean by that, where did you go? **[94]**

A. After I got the scolding I went away.

Q. Where? A. In charge of the Filipino.

Q. In that couple of minutes between the time you took the chain down—pardon me, I will withdraw that. After Otterson, you say, gave you a scolding for taking down the chain, then what did he do?

A. He again put the chain around.

Q. He put it around? A. Yes.

Q. Did he put it around before or after the accident?

A. No, the accident had taken place before that time.

Q. What did Otterson do between the time he scolded you and the time of the accident?

(Testimony of John Wailiula.)

A. He didn't do anything, as far as I can remember.

Q. Where was he?

A. I last saw him after we took the injured Filipino from the hatch into the boat.

Q. I am asking what he did between the time he scolded you and the time the accident happened, in that interval.

Mr. DAVIS.—He already answered that; he said nothing. I submit the question has been asked and answered.

The COURT.—I will let him answer it again, though.

A. Otterson told me in the meantime not to be careful again—not to be careless again.

Mr. WARREN.—When did he tell you that,—after the accident?

A. That was after the accident.

Mr. WARREN.—Read the question, Mr. Reporter.

(Last question read as follows: I am asking what he did [95] between the time he scolded you and the time the accident happened, in that interval.)

A. What he did was to give assistance to the Filipino.

Mr. WARREN.—I'll give it up.

Mr. BANKS.—He made it pretty plain, I think.

Mr. WARREN.—The answer is not responsive in the slightest; he is talking about after the accident.

The COURT.—The question was, from the time

(Testimony of John Wailiula.)

he scolded up to the time the accident happened, what he was doing?

Mr. WARREN.—Yes, and now he is telling us that he assisted the Filippino afterwards.

Mr. DAVIS.—He said he did nothing; he answered the question.

A. What he did was to give assistance to the Filipino.

Mr. WARREN.—When he gave assistance to the Filipino, the Filipino had already fallen in the hatch, had he? Ask him. A. Yes.

Mr. WARREN.—All right, I give it up.

Q. When, as you say, Otterson said, "You are careless in taking down the chain," did you make any effort to put the chain up again?

Mr. DAVIS.—I object to it as leading; he is asking what he did and is suggesting an answer, and I object to it on that ground. Let's have a ruling.

The COURT.—I will certainly rule on it very promptly, Mr. Davis; I overrule the objection.

Mr. DAVIS.—Well, I submit the question is leading.

The COURT.—I don't think it is.

Mr. DAVIS.—I respectfully except and assign the same as error. **[96]**

The COURT.—Yes, but can't you do it without storming at me that way?

Mr. DAVIS.—Yes, your Honor; your Honor is mistaken.

The COURT.—You can except in a respectful manner and without attempting to display your tem-

(Testimony of John Wailiula.)

per. Read the last question again, Mr. Reporter.

(Last question read.)

A. Yes, I did.

Mr. WARREN.—What did you do about that?

Mr. BANKS.—Just a moment, Mr. Warren. Your Honor, please may I find out if this was after the accident?

Mr. WARREN.—I assume you are following the testimony, Judge Banks. I have just been rebuked for having an understanding about it.

Mr. BANKS.—I was going to make an objection, if your Honor please, if it was after the accident it would be immaterial what he did.

Mr. WARREN.—Was that effort you made to put up the chain, made before or after the accident?

Mr. BANKS.—Then my objection is withdrawn.

The COURT.—Go ahead.

Mr. WARREN.—I am asking for your best recollection.

A. To the best of my recollection, is that after the first mate gave me the scolding I immediately got busy and tried to put this chain back to its place. Whether the accident happened before I tried to put it back in its place, before or after I couldn't very well say it now, I am trying to brighten up my memory. [97]

Q. But you really cannot remember?

A. When the first mate gave me the scolding and told me to put the chain back to its place, I did so according to his order. No sooner had I done that than I turned around this way and there I saw the Filipino had fallen down in the hatch.

(Testimony of John Wailiula.)

Q. Well, now, had he fallen down there before you put the chain back or after you put the chain back?

A. Very shortly after I had put the chain back the accident happened.

Mr. WARREN.—You may cross-examine.

Cross-examination of JOHN WAILIULA.

Mr. DAVIS.—This is a rough plan here. Now, did the passengers that came from the shore, including the man that was injured, come on the starboard or port side of this vessel, here is the starboard and there is the port.

A. Starboard side.

Q. And where is this hatch, about in the middle, is it? A. Yes.

Q. And where was you loading freight, from the port side? A. Yes.

Q. Now, how many feet wide is the boat there,—that's right in the middle of the boat, isn't it, isn't the hatch right in the middle of the boat? How many feet on each side?

A. From where the Court is sitting to this railing. [98]

Q. Yes, and that's on each side of the hatch?

A. Yes.

Q. Now, will you swear positively that this chain was up before, that it was up when that Filipino fell down that hatch? A. Yes.

Q. You put it up, eh? A. Yes, I did.

Q. And how high was it? A. About that high.

Mr. WARREN.—About thirty inches?

Mr. DAVIS.—Yes.

Q. How did the mate come to scold you about be-

(Testimony of John Wailiula.)

ing careless and you put the chain up, can you explain that to the Court?

A. Because I had taken down the chain before that; before he gave me the scolding I took out the chain.

Q. It took you a long while to find out whether you put the chain up after the accident happened or before it happened?

A. No, it didn't take me very long to think about it.

Q. You did testify that the chain was down when the accident happened, didn't you, in answer to a question by Mr. Warren? A. I don't think I did.

Q. You don't think you did; well, are you sure about it, is your memory clear about it?

A. My memory is clear now.

Q. Yes, clear now, but it wasn't clear before.

A. I think I was confused before.

Q. Your memory is very clear about it now, eh?

A. I am in good shape.

Q. How high was the deck of this vessel right over this hatch? This was between-decks in the steerage, wasn't it, where [99] this accident happened?

A. Yes.

Q. And overhead how high is the deck up above, the ceiling of this deck, how high?

A. About that height. Sometimes we did painting on the deck too—

Q. Up to that picture; how many feet is that,—about seven and a half feet?

The COURT.—Seven and a half feet. About as high as you can reach?

(Testimony of John Wailiula.)

A. Yes.

Mr. DAVIS.—Do you admit seven and a half feet?

Mr. WARREN.—I think about eight.

Mr. DAVIS.—When you speak about doors that is on the side of the vessel, both the starboard and the port side, there is an iron door there, isn't there, one door that goes down, or are there two doors that shut?

A. Two doors.

Q. How wide is the space there where these passengers come on where the doors are?

A. About the width of this door.

Q. How many feet?

The COURT.—That is about four feet.

Mr. DAVIS.—Does he mean both doors?

A. Yes, sir.

Mr. WARREN.—I submit that is nearer six, your Honor, across these two doors.

The COURT.—Yes, I should think at least five and a half feet [100] across there.

Mr. DAVIS.—What time did this accident happen?

A. About three o'clock in the afternoon.

The COURT.—About five feet make it.

Mr. DAVIS.—You swear it was about three o'clock in the afternoon?

A. That is the best of my recollection.

Q. That's your recollection; that's the best recollection you got of it is that it was half-past three in the afternoon.

(Testimony of John Wailiula.)

A. It was between three and half-past three in the afternoon.

Q. And all the other witnesses here testified it was half-past six and now you testify half-past three.

Mr. WARREN.—I object to that, your Honor, that is not evidence.

The COURT.—It don't make any difference what the others have testified.

Mr. DAVIS.—Is your memory clear about that, that it was half-past three?

A. I am positively sure it was between three and half-past three in the afternoon.

Q. Between three and half-past three, and you are not sure about the electric lights being lit in there?

A. I don't think the electric lights had been lit.

Q. No; no trouble to read a newspaper in there, I suppose. A. Yes; no trouble at all.

Q. No; very light, eh, very light in there at that time? A. Yes, very light.

Q. When you took this man out of the hold, when you helped this Filipino out of the hold after the accident happened, [101] was he sensible or insensible?

A. I think he was insensible, because he didn't say a word; he didn't utter a word at all.

Q. Was he bleeding? A. A little bit.

Q. About the head and face?

A. Back of the head.

Q. Where was the first mate when you took him up? A. He was there.

Q. Was the third mate there also?

(Testimony of John Wailiula.)

A. Yes, he was there, and it was he who lifted this Filipino out of the hatch.

Q. How long have you been going to sea?

A. About twenty years.

Q. You are not sure whether the mate gave you that scolding before you put the chains up or after you put it up?

A. The accident happened after I put the chain up.

Q. I didn't ask you about the accident, I asked you about the scolding, read the question.

(Last question read.)

A. The scolding took place before I put the chains up.

Q. Before you put the chains up. How long after the chain was up—you didn't see the Filipino fall in this hatch? A. No.

Q. Then how long before you discovered that he was in the hold, how long a time elapsed between the putting up of the chain and the first you knew he was down in the hold?

A. Five minutes, perhaps, more or less.

Q. Yes, and did this chain go all around the hatch?

A. Yes, but it wasn't one long chain. Four different chains, [102] and all of them I put them back.

Q. I know, but there are four different chains, a set of chains on both ends of the hatch and on the starboard and port side?

A. Excepting one end of it, because there was a partition, a passage partition there.

(Testimony of John Wailiula.)

Q. But this hatch, I mean, there is only three chains then? A. Yes.

Q. And on one part of the hatch there is no chain at all? A. No, that's where the ice store is.

Q. I see, but there is no chain on one part of the hatch at all. A. No.

Q. Then it was on this side end—just point out there, will you, where the chains were?

A. This is where the ice storage is.

Q. No chains there,—mark X,—eh, no chain? Now, how did you put the three chains up?

A. Two chains were already up, and I only unloosened one.

Q. You unloosened this one here?

Mr. WARREN.—I object to the question because the record is not going to show that, and if counsel puts a figure down on a piece of paper and says "here," the answer of the witness is not going to make it so the Court reading the testimony could make anything out of it, or make anything out of it sitting where you are. I submit the question can be put without reference to the sketch.

The COURT.—Yes.

Mr. DAVIS.—I am going to use it. You can't direct me what kind of a paper I am going to have; I can look at this. [103]

Q. Was it the port side chain you put up or the starboard side chain? That will indicate it.

A. I unloosened the chain on the left side of the steamer.

Q. That is the port side? A. Port side.

(Testimony of John Wailiula.)

Q. Yes. And all this happened from the time of your putting up the chains and the time the Filipino happened to fall in there, there wasn't more than five minutes elapsed? A. Yes.

Q. Now, isn't it a fact—did the mate say anything to you about this scolding, about this Filipino being hurt?

A. I couldn't remember distinctly what he did say other than giving me a scolding.

Q. But didn't he say something about the Filipino being hurt at the time he gave you the scolding?

A. He didn't say anything to me after the Filipino had fallen in the hatch. It was time for us all to give help to the Filipino.

Q. Yes, but didn't he say something to you about the Filipino after it happened, after you brought him out of the hold?

A. No, he didn't say anything else except tell me to take the Filipino ashore.

Q. Was your back turned to the Filipino when he fell in there? A. My back was turned to him.

Q. And you was busy getting this baggage from the boat at the time? A. Yes.

Q. This boat was lying along the port side then?

A. Yes. **[104]**

Q. And your attention at the time the Filipino fell and the accident happened was directed to that business of getting this baggage from this boat?

A. Yes.

Q. And you were very busy and wasn't paying any attention to the Filipino?

(Testimony of John Wailiula.)

A. I did have some thought about the Filipino, but my attention was directed to the baggage more than anything else.

Q. And there was a lot of people standing around there at the time? A. Yes.

Q. How many people were around there—

Mr. WARREN.—I want to ask the interpreter if the witness in his last two answers did not speak of clearing the passages.

Mr. DAVIS.—But you are putting that in and interrupting my questioning.

Mr. WARREN.—This is a question of interpretation, your Honor, whether the interpreter has not inadvertently omitted part of the answer. I understand a little Hawaiian.

The INTERPRETER.—Yes, sir; the witness did say he was busy attending to looking after the boats as well as giving orders to the passengers to clear a way.

The COURT.—All right, go ahead.

Mr. DAVIS.—At the time you gave the order you didn't see the Filipino at all?

A. I didn't see that Filipino, of course there were several other Filipino there.

Q. Sure, and your back was then turned to them?

[105]

A. Yes.

Q. How long have you been going to sea?

A. Twenty years.

Q. How big is this chain that goes around this hatch, how big around?

(Testimony of John Wailiula.)

A. Just like that chain over there.

Q. I mean how big,—is it like that big one over there holding that light, was it a half inch or an inch chain? A. I don't know, I didn't measure.

Q. You don't know what the mate said to this Filipino before the accident happened, do you?

A. If the mate said anything?

Q. Did he say anything to this Filipino before the accident happened?

A. I don't know whether he said anything to him or not.

Q. You don't know whether the third mate said anything to him before the accident happened?

A. I don't know whether they had a conversation or not.

Q. Then you really don't know what took place between the first mate and the third mate and this man that was injured, this Filipino?

Mr. WARREN.—I object to that question because it assumes something did take place, and there is no testimony upon which to found that.

Mr. DAVIS.—I said you don't know what took place, if anything did take place?

Mr. WARREN.—That is a different question.

A. No. [106]

Mr. DAVIS.—Do you know whether this Filipino had a first-class or a second-class ticket?

Mr. WARREN.—Object to that as not proper cross-examination, and it is also covered by the admissions of counsel in the case that he was a first-class passenger and had a first-class ticket.

(Testimony of John Wailiula.)

Mr. DAVIS.—I want to test his knowledge and see what he knows about it.

Mr. WARREN.—If you want to make him your witness, you may, but that is not proper cross-examination.

The COURT.—He didn't ask him what kind of a passenger he was; he didn't say anything about that.

Mr. DAVIS.—He was in the steerage quarters at the time this man was, this Filipino.

A. He was a cabin passenger.

Q. I know, but he was between-decks, I didn't ask him that. A. Yes.

Q. He was between-decks, and you at no time seen him in the first-class passengers' quarters?

A. After I allowed the passengers to go aboard I don't know what happened afterward.

Q. Yes, and all the time you saw him it was in the steerage quarters?

A. I know that this Filipino went upstairs and remained on the cabin.

Q. And then came down again?

A. Perhaps he came down again; I don't know when he came down.

Q. Well, he must have come down before he fell?

[107]

A. Perhaps so; I don't know about that.

Q. When you took hold of this Filipino to lift him out of the hold, was the chain up or down on that hatch? A. The chain was up.

Q. You didn't take it down to lift him out?

A. No.

(Testimony of John Wailiula.)

Q. The chain was up? A. The chain was up.

Q. Well, have you any idea how the man fell in, then, if the chain was up?

A. My idea is perhaps he went over there to look down and owing to the rolling of the steamer it knocked him down in the hatch.

Q. You didn't see him looking in there?

A. No, I did not.

Q. No, if he fell in backwards he couldn't have been looking in there. A. No, he couldn't have.

Mr. DAVIS.—That's all.

Mr. WARREN.—That is all.

The COURT.—We will adjourn until then, until to-morrow afternoon at two o'clock.

The Court then adjourned to 2:00 P. M., April 24, 1918. **[108]**

*In the United States District Court, in and for the Territory of Hawaii.*

AD. 172.

ANATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,
Libelant,

vs.

The American Steamship "KINAU" Her Engines, Machinery, Boilers, Tackle, Boats, Furniture and Appurtenances,
Libellee.

Honolulu, H. T., April 24, 1918,
2:00 P. M.

**Testimony of Kui Lobo, for Libellee.**

Direct examination of KUI LOBO, for libelee, sworn.

Mr. WARREN.—(Through interpreter, Mr. Hakuole.) Q. You are employed on the Inter-Island steamship "Kinau," you were employed on that vessel in the month of December last? A. Yes.

Q. On the trip when a Filipino fell into the hatch in the steerage quarters? [109] A. Yes.

Q. What was your position on the boat at that time?

A. Ordinarily I was third mate on the steamer, but on that particular trip I did not have my third mate's cap.

Q. What cap were you wearing?

A. A cap with the brand of second officer in front?

Q. Where were you when you first heard of that accident?

A. I was in the after part of the ship at that time, but I didn't know or hear of the accident. The first mate told me to go forward and I did in obedience of his orders.

Q. Now, where were you when you first heard of the accident?

A. I was in front hauling on the deck, an automobile on the deck.

Q. Who told you about it?

A. The quartermaster.

Q. What did you do?

(Testimony of Kui Lobo.)

A. When I heard of it I ran in the after part of the steamer and looked down and saw this Filipino had fallen.

Q. That was down in the hatch in the steerage quarters? A. Yes.

Q. What next did you do?

A. I went down and got him, and when I looked up and when I saw the first mate standing above I handed the man to him.

Q. At the time you went down into the hatch did you notice whether or not there were any chains around it?

Mr. DAVIS.—I object to that as leading and suggesting an answer.

The COURT.—Overruled.

Mr. DAVIS.—Exception, your Honor. [110]

A. When I heard of this accident and upon learning that a man had been injured in that hatch, I ran down without paying attention or looking around to see whether there was anything else there. My attention was directed to the injured person, and so I jumped down.

Mr. WARREN.—Q. So you don't remember whether there were or not?

A. No, I couldn't remember.

Q. Do you recollect whether that hatch was entirely open or partly covered?

A. The port side was open; the starboard side closed.

Q. About how much, how much was closed and how much open?

(Testimony of Kui Lobo.)

A. I don't know how much, but I know that half of that hatch, right side, was closed and the other side open.

Q. The right side is the starboard? A. Yes, sir.

Q. And port side the left? A. Yes.

Q. After you got that man up out of the hatch, what next did you do?

A. Then I lifted him up and went downstairs and put him on the boat and rowed ashore.

Q. Went downstairs—what do you mean?

A. Lifted him up on to the staging and down in the boat.

Q. To the stage. Did you lift him up to the stage or lower him down to the stage—where was the stage?

A. I first got this injured man out of the hatch on to the deck, where the first mate was. From there, having received an order from the mate, I took him down on to the stage and then down to the boat.

Q. Where was the stage, down below or above the port door. [111]

A. Below the port on the side of the steamer.

Q. Where that boat was down below with trunks and baggage in it? A. Yes, sir.

Q. Now, having lowered him into the boat, helped get him down into the boat, what did you do?

A. I went into my room and took off my shirt. It was smeared with blood, and I didn't want people to see that, and I went down into the boat—I didn't go down to the boat, but I went forward.

Q. What deck? A. Cabin deck.

(Testimony of Kui Lobo.)

Q. Upper deck? A. Upper deck.

Q. Now, did you at that time see anything of a little girl that had anything to do with this Filipino man?

A. Yes, I saw a little girl like that. I went up on the cabin deck above that deck and there I saw this little girl with a package of matting or mats.

Q. Where was she?

A. She was on the port side of the deck.

Q. Sitting down or standing up?

A. Sitting down.

Q. What did you do, if anything, with that little girl?

A. I went and told the steerer or wheelman to put her into a boat and send her ashore.

Q. Why?

A. Because she was unattended by parents. The only parents who was there was her father.

Q. Well, how did you understand that this little girl,—that it was her father who was hurt, how did you understand that? **[112]**

A. Because all these Filipinos told me about it.

Q. Filipinos other than the injured man?

A. Yes.

A. Q. All right. What was done with her—was she sent ashore, too? A. Yes.

Q. And now I want to ask you when you got down into the steerage deck there to help get that man out of the hatch, what was the condition in there—light or dark? A. Light.

Q. Well, just how light? Describe it.

(Testimony of Kui Lobo.)

A. It was so light that a man could see things there below.

Q. Below where? A. Below in the hatch.

Q. How many port doors are there on that deck, the steerage deck? A. Two.

Q. Where are they?

A. Port side one, and one on starboard side.

Q. How large are they?

A. I think about six feet in length, and four or five feet high.

Q. Were they open or shut at that time?

A. Open.

Q. How far is the port door on the port side from the hatch where this man had fallen in?

A. I think it is between six and eight feet.

Q. Where was the sun—above or below the horizon?

Mr. DAVIS.—I object on the grounds that it is leading; let [113] him say what time it was.

Mr. WARREN.—I am willing to meet counsel on that and ask him where was the sun at the time of the accident, if you noticed?

A. I didn't look at the sun, but the light of the sun was in such a position that the size of the precipice in that vicinity could be seen.

Q. Just explain that a little better; I don't quite get that.

A. The light of the sun on the port side reflected in such a way on the Pali or precipice that the precipice could be seen.

(Testimony of Kui Lobo.)

Q. Precipice on which side of the boat, port or starboard?

A. Port side. There are Palis on both sides as the steamer enters the harbor, but as she anchored the Pali was on the port side.

Q. Now, where was the sun, on which side of that Pali?

A. The Pali is quite high, slanting down over, and the sun was on the west side of the highest point of that Pali.

Q. Now, could you see the sun?

A. I could see the sunlight, not the sun itself; the sun itself having descended beyond the Pali.

Q. Now, if that Pali were not intervening between the boat and sun, can you tell us about how far the sun would be above the horizon, of the water?

Mr. DAVIS.—That is objected to as leading and suggestive, and has already been answered.

The COURT.—He has not yet found how high it was above the horizon. Go ahead. [114]

Mr. WARREN.—Let me put it another way: Where was the sun with respect to the horizon, water line of the sea?

Mr. DAVIS.—I object to that on the same grounds.

The COURT.—Overrule the objection.

A. The sun was not visible at that time on account of the Pali intervening between the sun and the steamer, but I could see the sunset—the light of the sun, of the sunset, I could see the light of the sunset.

Mr. WARREN.—Q. Have you any recollection—can you try and tell us what time of day it was by

(Testimony of Kui Lobo.)

the clock, have you any idea of that, when the accident happened?

A. It was between five and six o'clock.

Q. Can you place it any nearer than that, was it nearer five than six?

Mr. DAVIS.—I object most strenuously.

Mr. WARREN.—Or nearer six o'clock?

A. It was after five—between five o'clock and six o'clock.

Q. Well, was it more than half after five or less than half after five?

Mr. DAVIS.—Object on the same grounds, and the question is leading.

The COURT.—Overrule the objection.

Mr. DAVIS.—Exception.

A. I couldn't say as to that, but I can say I do remember that it happened—it was between five o'clock—it was after five o'clock and before six o'clock.

Mr. WARREN.—All right, you may cross-examine.

Mr. DAVIS.—No questions.

No cross-examination. **[115]**

### Testimony of C. M. Aika, for Libellee.

Direct examination of C. M. AIKA, for libellee, sworn.

Mr. WARREN.—(Through interpreter, Mr. HAKUOLE.) Q. Were you employed on board the Inter-Island steamship "Kinau" in the month of December last? A. Yes, sir.

(Testimony of C. M. Aika.)

Q. On the trip when a Filipino fell into a hatch in the steerage and got injured? A. Yes.

Q. Where were you working at the time of that accident?

A. I was on the steamer on the steerage, on the stage there.

Q. On the stage; where was that stage?

A. On the side of the steamer.

Q. How long had you been on that stage?

A. I had stood there five minutes before the boat—before the freight-boat reached the steamer.

Q. Yes, and just what were you preparing to do when the accident occurred?

A. I was standing there waiting for the freight-boat to come alongside the steamer.

Q. The accident happened before the freight-boat got below the stage or afterwards?

A. The boat was just coming alongside the steamer when this accident happened.

Q. Now, did you see this Filipino man fall into the hatch? **[116]** A. I didn't see him fall.

Q. What is the first you knew of the accident?

A. I heard from the Filipino passengers who said who called for help, that a man was injured, a Filipino was injured.

Q. And at that time you were on the platform, on the stage? A. Yes.

Q. What did you do?

A. Well, I rushed towards the hatch and went down until I got to the Filipino.

Q. Anybody else with you? A. Yes.

(Testimony of C. M. Aika.)

Q. Who was that? A. The boy sitting there.

Q. Kui Lobo? A. Yes.

Q. And when you got in there to go down the hatch to get the man out, did you notice whether or not there were any chains around the hatch?

Mr. DAVIS.—Objected to on the grounds that it is leading.

The COURT.—I don't think that is leading. It doesn't suggest which answer is desired.

Mr. DAVIS.—Will your Honor kindly allow me an exception?

The COURT.—Yes, sir.

A. I saw the chains were up, were there.

Mr. WARREN.—On how many sides of the hatch?

A. Four sides, all four.

Q. Now, at the time that accident happened did you notice whether it was light or dark in the steerage quarters?

A. It was light then, the sun was up.

Q. Where was the sun? **[117]**

A. The sun was above the mountain.

Q. How far above?

A. Quite high up, about the height of this room from the mountain.

Q. Can you give us an idea about what time of day it was, can you remember that at all?

A. I think it was between three and four o'clock.

Q. When you say it was light in there, tell us how light, how much could you see?

A. Anything in there could be seen.

Q. How many doors to that steerage deck?

(Testimony of C. M. Aika.)

A. Two.

Q. How high are they?

A. I suppose the width is about the width of that door.

Q. The doorway entrance to the courtroom; how high? A. Just about my height.

Q. Now, where are those doors?

A. By the sides of the steamers, one of which is for the use of the freight and the other for the passengers.

Q. Were they open or shut?

A. They were open at that time.

Q. Did you see anything of that Filipino man before he fell into the hatch? Did you take any notice of him before that, when he came on board?

A. No.

Mr. WARREN.—That is all, you may cross-examine. [118]

Cross-examination of C. M. AIKA.

Mr. DAVIS.—Now, this hatch, eh? That represents the hatch where that man fell down. Now, you testified there was chains around all four sides of that hatch.

A. Yes.

Q. No chain up here on the starboard side?

Mr. WARREN.—Wait, Mr. Davis,—

Mr. DAVIS.—No, I won't.

Mr. WARREN.—I object to counsel using a rough sketch.

Mr. DAVIS.—You are sure about that now, that

(Testimony of C. M. Aika.)

there were chains all around the four sides of this hatch?

A. Yes, sir.

Q. Now, you say it was between three and four o'clock that this accident happened? A. Yes.

Q. Now, you are sure about that?

A. I am sure of that, not mistaken.

Q. Yes, it wasn't after four o'clock? A. No.

Q. Did you see the Filipino when he was taken up out of the hold there?

A. Yes, I did, when he was being lifted out of the hold, the hatch.

Q. Now, wasn't you on the stage outside, wasn't you on the stage outside at the time that this accident happened, outside on the stage outside on the boat, on the side of the boat? [119]

A. I was standing on the stage outside of the steamer at the time of the accident.

Q. Yes, exactly.

A. But when I heard of this accident I came to his help.

Q. I didn't ask you if you come to his help; I simply asked you where you were at the time of the accident. Where was that stage,—on the port or starboard side of that steamer?

A. I don't know whether it was the port side, but the stage was—the stage was on the side where the freight-boat—where the freight comes up on board through the hole.

Q. Well, was it the port or starboard side, you ought to know that.

(Testimony of C. M. Aika.)

A. I am not familiar with that; perhaps it was the port side.

Q. All right; how many feet was it up? Was it forward of the port hole or was it aft of the port hole where this stage was?

A. It was above the port hole, not aft.

Q. It was on the forward—forward of the port hole?

Mr. WARREN.—Didn't he say malolo?

A. On the forward part of the steamer, on the side.

Mr. DAVIS.—Exactly; how many feet from the port hole?

A. As far as the Court is standing now, to where I am.

Q. Exactly; therefore you couldn't see in the steerage quarters between-decks at all from where you were standing?

A. Sure, I could have seen the quarters inside of the steamer, but my back was towards that, I was facing shore, outside, not inside.

Q. You couldn't see where you was standing on that stage, you [120] couldn't see in through the port into the steerage? A. Yes, I could.

Q. But your back was turned, you was facing the shore.

A. Yes, my back was to the shore, but I was watching the freight.

Mr. WARREN.—I am going to object to counsel offering sketches himself. I would ask the witness to make one himself.

(Argument.)

(Testimony of C. M. Aika.)

Mr. DAVIS.—All right; the sketch is withdrawn.

Q. I want to make it clear; you were on this stage at the time this accident happened, on the outside of the boat? A. Yes.

Q. Forward of the port hole? A. Yes.

Q. And facing the shore—

A. Forward of the port hole but near by the side.

Q. I know, but forward of it anyway, how many feet?

A. About the distance where the Court is sitting, to me.

Q. About seven feet from where his Honor is sitting?

The COURT.—No; about seven feet.

A. I think so.

Mr. DAVIS.—Exactly; and how long before that had you been in the steerage quarters where the hatch is and where this man fell down? How long before the accident happened had you been in the steerage and—we got you on the stage now, how many minutes before that were you in the steerage where this hatch was where this man fell down and where this accident happened?

Mr. WARREN.—I wish to object, that is not proper cross-examination. Your Honor will recall that the witness [121] testified on direct that he was on the stage and heard of the accident and went up to help.

A. You mean from the stage inside the quarters?

Mr. DAVIS.—How many minutes before were you inside?

(Testimony of C. M. Aika.)

A. I remember while I was standing out on the stage waiting for the boat containing the freight, I had not been down there, I suppose, five minutes.

Q. It was five minutes after you left inside that the accident happened, five or ten minutes, which?

A. Five minutes.

Q. Yes, and wasn't there plenty of time to take the chains down from the time you got in there until the accident happened?

Mr. WARREN.—I object; that is immaterial, and not proper cross-examination.

Mr. DAVIS.—Between the time he left inside there and went out on the stage?

Mr. WARREN.—While he was outside, you mean?

Mr. DAVIS.—Yes.

The COURT.—I think it is legitimate; go ahead.

Mr. DAVIS.—Wasn't there plenty of time to take the chains down from the time he left?

A. No, the chains couldn't be taken down then, couldn't be done so unless the freight was brought there and before hauled down in the hatch.

Q. Didn't it only require a man to unhook the chain?

A. Yes, ordinarily they do that if there is freight there; if there is no freight there they don't do it.

[122]

Q. All I asked you is simply didn't they have to unhook it? Never mind about the freight.

A. You can't very well unhook that chain because the hook has two catches.

(Testimony of C. M. Aika.)

Q. How long does it take to unhook it?

A. Not very long if you were to do it.

Q. Now, just tell us how long, if you will.

A. About a half a minute.

Q. Yes; now, when you were in there your attention was not particularly directed to that hatch, there was nothing happened while you were inside?

A. No, my attention wasn't absolutely directed to that portion of it, because I was told to look after the freight.

Q. I didn't ask you that; I said nothing happened at that particular time to direct your attention to the hatch. A. No.

Q. The accident didn't happen till you got outside?

Mr. WARREN.—I submit that is all thoroughly covered, your Honor.

The COURT.—He says it happened while he was outside.

Mr. DAVIS.—Your attention wasn't particularly attracted—just state anything—withdraw that. Just state any reason why your attention was directed to these chains.

Mr. WARREN.—Before or after the accident?

Mr. DAVIS.—Before the accident.

Mr. WARREN.—Objected to as immaterial.

Mr. DAVIS.—State any reason, if you can, why your attention was particularly directed to these chains around that hatch [123] before the accident.

Mr. WARREN.—I object to it on the ground that

(Testimony of C. M. Aika.)

the witness testified there was no reason, and he didn't pay any attention before the accident.

The COURT.—He testified when he got back in there the chains were up on all four sides. I don't know that he said anything about whether he paid any attention to them before that time.

Mr. DAVIS.—I will ask him then: Was you paying any attention to these chains before the accident happened?

A. No, I didn't think of them because they were fastened tight before that.

Q. You had no reason, you didn't look, eh?

A. No.

Q. Now, I will give you another opportunity; you say the chains was all right around the hatch on all four sides of it?

Mr. WARREN.—When?

Mr. DAVIS.—Before the accident, before it happened.

Mr. WARREN.—He didn't testify that.

Mr. DAVIS.—On all four sides of the hatch, after the accident.

A. Yes, it was surrounded by chains.

Q. On four sides? A. On the four sides.

Q. Was this man badly injured when you got him up out of the hold?

Mr. WARREN.—I object; it is not proper cross-examination.

The COURT.—Counsel for the libelee didn't go into the nature of the injuries at all.

Mr. WARREN.—I insist on my objection unless

(Testimony of C. M. Aika.)

counsel wants to [124] make him his own witness.

Mr. DAVIS.—I appeal to the Court that it is proper cross-examination.

The COURT.—He has not undertaken to prove anything about the nature of the injuries at all by this witness, and therefore I will disallow the question.

Mr. DAVIS.—Except to your Honor's ruling.

The COURT.—All right.

Mr. DAVIS.—How long have you been on the steamship "Kinau"? A. More than a year.

Q. And did you help put any of the freight that came out on the boat down in the hold from the stage?

Mr. WARREN.—Objected to as immaterial; there is no testimony of freight having been put down in the hold.

Mr. DAVIS.—The boxes that come out in the boat. I submit the question without argument; I submit it is proper cross-examination.

Mr. WARREN.—I will withdraw the objection to save time.

The COURT.—Go ahead.

A. You mean at that time?

Mr. DAVIS.—Yes.

*Q.* No, no freight put in.

Q. Where were you when the man was brought up out of the hold? A. I was down in the hold.

Q. You went down in the hold?

A. I was in the hold.

Q. I see; when the man was down there, when the

(Testimony of C. M. Aika.)

Filipino was down there?

A. After he fell down in the hold I went down there. Thought [125] I already explained to you.

Q. What was his condition at the time you got down there?

Mr. WARREN.—The same objection, that is not in on direct examination at all.

The COURT.—He didn't bring out anything of that kind, Mr. Davis.

Mr. DAVIS.—I will ask him, then, what he saw when he got in the hold, what he found.

Mr. WARREN.—The same objection, it is immaterial to the direct examination.

Mr. DAVIS.—I submit it is material, what he saw and what he found.

The COURT.—Sustain the objection.

Mr. DAVIS.—Kindly allow me an exception. That is all.

Redirect Examination of C. M. AIKA.

Mr. WARREN.—Where is this stage located with respect to the port door through which the freight was to pass?

Mr. DAVIS.—I object; it is already asked and answered.

The COURT.—He answered that as forward of the hold and that he was about seven feet from it.

Mr. WARREN.—That was not gone into on direct, your Honor; it was brought out on cross and it was wrong. The witness certainly didn't under-

(Testimony of C. M. Aika.)

stand the question, and I want the record to show—well, your Honor considers it immaterial, I will drop it. [126]

**Testimony of Pua Ku, for Libelee.**

Direct examination of PUA KU, for libellee, sworn.

Mr. WARREN.—(Through Interpreter, Mr. HAKUOLE.) Q. You were a member of the Inter-Island steamer "Kinau" last December, when a Filipino fell into a hatch? A. Yes.

Q. Where were you at the time of the accident?

A. I was in the boat.

Q. Where was the boat? A. Left side.

Q. Port or starboard? A. Port side.

Q. And what were you doing?

Mr. DAVIS.—I submit it is incompetent, irrelevant and immaterial what he was doing in the boat; the accident didn't happen in the boat.

The COURT.—Objection overruled.

A. Getting ready to get the freight aboard.

Mr. WARREN.—Where was that freight to go, through what place to get it on to the ship?

A. It was to be lifted on the stage and from there into the steamer and down in the hatch, hold.

Q. And where was that stage with respect to the boat?

A. The stage is above—the boat is below, and the stage is immediately above it.

Q. Now, where was the stage with respect to the

(Testimony of Pua Ku.)

port door of the ship where the freight was to go through? [127]

A. This stage was directly outside below—no, this stage was directly below the port hole where the freight was to be put in.

Q. Yes; now right after the accident do you know what was done with the man?

A. Well, all what I know is when the injured man was brought into the boat and rowed ashore.

Q. Did you go in the boat ashore with him?

A. Yes, I was in the boat.

Q. Now, at the time that accident happened and that man was put down in that boat to be taken ashore what was the condition—withdraw that. Was it light or dark? A. It was light.

Q. Now you are speaking of outside of the boat, outside of the steamer?

A. Well, light outside of the steamer and light outside of the steamer.

Q. Well, how do you know about the light inside of the steamer? A. It was day time, daylight.

Q. Now, can you give us—

Mr. DAVIS.—That is a voluntary answer about being light inside the steamer, and I move it be stricken out.

The COURT.—Overrule the motion to strike.

Mr. DAVIS.—Exception.

Mr. WARREN.—What time of day was it as near as you know?

A. I don't know about that because I didn't have a watch at the time to look.

(Testimony of Pua Ku.)

Q. Well, have you any idea at all? [128]

A. I think it was after five o'clock, between five and half-past five.

Q. Now, when you got to the landing with the man in the boat, how about the conditions then,—was it light or dark there? A. It was light.

Mr. WARREN.—Cross-examination.

Cross-examination of PUA KU.

Mr. DAVIS.—(Through Interpreter, Mr. Hakuole.) Q. You didn't see this accident?

A. I didn't see this Filipino fall in the hold.

Q. No, you were not in the steerage quarters at all? A. I was in the boat at the time.

Q. Yes, and was it nearer six o'clock than five o'clock when the accident happened?

A. It was between five and six o'clock.

Q. You don't know what time it was; that's about it. A. No, I don't know.

Q. You don't know what time it was?

A. I don't know the time.

Q. You haven't even got any idea about it.

A. No, there was no time for me to think about the time; I was in a hurry to take the Filipino ashore.

Q. Exactly; and all you know about it was after this Filipino was injured you took him ashore in the boat? A. Yes. [129]

Mr. DAVIS.—Yes, and that's all.

Mr. WARREN.—That is all.

The COURT.—This case will be continued until Friday at 2:00 o'clock.

This case was then continued until May 3, 1918, at 2:00 o'clock P. M. [130]

*In the United States District Court, in and for the Territory of Hawaii.*

AD–172.

ANATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad-Litem,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Boats, Furniture and Appurtenances,

Libellee.

Honolulu, H. T., May 3, 1918.
10:00 A. M.

**Testimony of Dr. R. G. Ayers, for Libelant.**

Direct examination of Dr. R. G. AYERS, for libellant, sworn.

Mr. WARREN.—Mr. Davis, is this part of your case in chief?

Mr. DAVIS.—Yes.

Q. Your name, please, Doctor?

A. R. G. Ayers.

Q. Are you a physician and surgeon duly licensed to practice [131] medicine and surgery in the Territory of Hawaii? A. I am.

Q. Now, did you go to the Insane Asylum yesterday and examine a Filipino? A. I did.

Q. By the name of Anatalio Peneyra?

(Testimony of Dr. R. G. Ayers.)

A. Yes, sir.

Q. Did you examine him, Doctor Ayers?

A. I did.

Q. Will you kindly state to Judge Vaughan the condition you found the man in?

A. I made an examination of the man's head, and I found a scar on the right-hand side over what is called the parietal region, a scar that was not of extremely recent origin, but not an old scar. I examined the man from his historical standpoint and the history of the case and his mental condition at that time. I must say that the examination at the time I examined him was negative, in other words that his mental condition was pretty nearly normal.

The COURT.—Normal?

A. At the time I examined him yesterday, yes, sir.

Q. Yesterday?

A. Yesterday. The history of the case, which I think is of the most importance, if I am allowed to give that—

Mr. WARREN.—That necessarily comes within the range of hearsay, your Honor.

A. No, I examined the records of the hospital, and also the *mittimus* through which he was committed. [132]

Mr. WARREN.—That is hearsay, the opinion should rest upon matters only in evidence. The directors' opinion should not rest on hearsay evidence—hearsay matters.

The COURT.—He can't base any opinion on

(Testimony of Dr. R. G. Ayers.)

hearsay. The only thing he can base an opinion on is the evidence here.

Mr. DAVIS.—Was the man sane or insane yesterday when you saw him?

A. At the time I saw him he was very nearly sane.

Q. But not completely recovered.

A. Well, as far as—in the examination, his mental condition was pretty nearly normal. The only thing I did notice was in questioning him regarding his sickness after the accident. He was pretty hazy regarding what had happened, that is all I can state.

Q. Yes, and how was his physical condition?

A. His physical condition was pretty fairly good.

Q. And he still is an inmate of the insane asylum?

A. An inmate of the asylum; yes, sir.

Q. Is there any other fact that you have not stated, Doctor?

A. Other than the history of the case that is all I can state in the matter.

The COURT.—That would be hearsay, Doctor.

A. Without a history, a diagnosis is usually impossible in any case.

Mr. DAVIS.—But you did get the history and made a diagnosis?

A. I got the history from the records of the hospital,—the asylum.

Q. From your examination of that scar and so forth, did you— [133] would that injury be sufficient to cause some disturbance of the brain so as to bring on insanity?

Mr. WARREN.—I object to that on the grounds

(Testimony of Dr. R. G. Ayers.)

that it does not appear that there is sufficient showing, that the doctor has knowledge of what the circumstances were, or how he came to be injured.

The COURT.—That objection is good.

Mr. DAVIS.—Now, then, Doctor,—all right. If it were as follows,—I will put a hypothetical question, your Honor. On or about the 19th day of December, 1917, if this man had fallen into a—down a hatchway into the hold of the steamship "Kinau," a distance of ten or fifteen feet, and struck on his head where that scar was, and brought up insensible, would such a fall and from your examination of the scar as I have described, be likely to cause mental trouble?

A. Well, it would be possible, it would be likely to; it would be possible.

Q. It could have that effect?

A. It could have that effect.

Mr. DAVIS.—That is all I will ask him.

Cross-examination of Dr. R. G. AYERS.

Mr. WARREN.—When you examined this man yesterday, Doctor, you conversed with him? [134]

A. Through an interpreter.

Q. Yes, that is the only means you had of getting any communication between yourself and him?

A. Well, only it being in Filipino, they used a good deal of the Spanish language and I understood quite a good deal of what was said, but I would not say that I could have conversed with him without an interpreter. I could not have conversed with him without an interpreter although I am a student of

(Testimony of Dr. R. G. Ayers.)

the Spanish language.

Q. That interpreter was Mr. Borha?

A. No, sir.

Q. He was not?

A. He was not. The interpreter was the city and county official court interpreter, Mr. Ocampo.

Q. Now, I want to ask you—well, I think that covers it. No further questions.

The COURT.—Stand aside, Doctor. [135]

**Testimony of Dr. W. A. Schwallie, for Libelant.**

Direct examination of Dr. W. A. SCHWALLIE, for libellant, sworn.

Mr. DAVIS.—Are you a doctor of medicine and surgery holding a diploma and duly licensed to practice medicine and surgery in the Territory of Hawaii? A. I am.

Q. How long have you been?

A. I graduated in 1889 from the University of Cincinnati.

Q. Do you occupy any position in reference to the insane asylum at the present time,—if so, what is it?

A. I am the superintendent, and have been for the last five years, little more than five years, of the Oahu Insane Asylum.

The COURT.—Located in Honolulu?

A. Yes, sir.

Mr. DAVIS.—The asylum is here in Honolulu

A. Yes, sir.

Q. Now, did you receive into that insane asylum under commitment, a person by the name of Anatalio

(Testimony of Dr. W. A. Schwallie.)

Peneyra, and if so, when?

A. We did, on January 5th, 1918.

Q. Did you make an examination of this man when he was taken to the insane asylum?

A. Not the first day, but a day or so afterwards we usually do.

Q. A day or so afterwards did you make an examination of this man? [136]

A. Yes, sir, I did.

Q. Will you please state to his Honor, Judge Vaughan, what you found?

A. He was in a melancholy state; depressed. He took very little interest in the surroundings. He would go to his meals, and he ate well and slept well. We did not—could not converse with him so he did not illustrate any hallucinations or delusions or anything that way.

Q. Was he received in the insane asylum by commitment from the district magistrate?

A. He was.

Q. As an insane person?

A. As an insane person.

Q. And so entered on your books? A. Yes, sir.

Q. Did you make an examination of the wound upon his head, Doctor? A. I did.

Q. What did you find, Doctor?

A. I found a scar about an inch and a half long over the right parietal region. There was no depression, that is, external depression of the bone.

Q. From your examination of these injuries, Doc-

(Testimony of Dr. W. A. Schwallie.)

tor, would that be likely to cause mental trouble in a way, or insanity?

A. It is possible it could.

Q. Yes; well, was the man sane or insane when you received him in the asylum?

A. Well, I would regard him as insane.

Q. Yes, he was insane, and he has been there ever since under treatment? A. He has. [137]

Q. He has not been discharged? A. Not yet.

Q. He is there yet? A. Yes.

Q. Is he improving?

A. He is; I consider him sane at present,—well, that is an opinion.

The COURT.—That is all right; you are entitled to give that.

A. Ten days ago I directed my assistant to write up the history and have him examined. He requested to be released, and also his guardian asked to have him discharged.

Mr. DAVIS.—But he has not been discharged?

A. Not yet.

Q. And did you question him as to the accident that occurred on the 17th of December on board the steamship "Kinau"? A. I did.

Q. Did he remember any of the facts and circumstances connected with that?

A. He did; yes, sir, he did.

Q. He did? A. Yes.

Q. You examined him as to that when?

A. Saturday morning with Doctor Ayers.

Q. Oh, yes, lately I see, but he is still in the custody

(Testimony of Dr. W. A. Schwallie.)

of the insane asylum? A. He is still there.

Q. And is that wound healed altogether?

A. It has, very nicely.

Q. Now, he has been there how long, Doctor?

A. Since January the 5th, that is four months.

Q. Eh? A. Four months. [138]

Q. Since January the 5th?

A. January 5th, yes.

Q. Been there four months; how long was he confined on "Kauai," do you know?

A. Well, the accident occurred on the 18th of December, so the commitment paper states.

Q. You say it is possible from the injury received and the examination you made of that man's head that it would cause brain trouble and insanity. Isn't it most probable that it would, a fall of that kind?

A. It may cause it; it is possible it could cause it.

Q. It could cause it? A. Yes.

Mr. DAVIS.—Take the witness.

Cross-examination of Dr. W. A. SCHWALLIE.

Mr. WARREN.—It is also possible, Doctor, that the state of melancholia depression in which you found this man when he entered the institution could have been caused by various other troubles?

A. It is possible he may have been melancholy at the time he had the accident, that is possible.

Q. Yes, was there anything in your examination of the man at that time that would lead you to form an opinion then, did you form an opinion that his depression of melancholia was due to some specific cause, or did you not know at all?

(Testimony of Dr. W. A. Schwallie.)

A. I could not form any opinion, only an opinion from the [139] history of the case that is in the commitment.

Q. From your own examination?

A. No, I could not state positively that that was the cause of his insanity, this blow.

Q. Will you state, please, say two or three other causes, contributing causes to insanity known as melancholia?

A. Well, it might be from disease, it may be a specific cause, for instance, syphilis, alcoholism and numerous causes.

Q. Then from your examination nothing would induce you to single out the blow as being more likely to be the cause than anything else?

A. Well, he might have been melancholia before that. The commitment paper states it is acute mania.

Q. You found no evidence of any depression of the skull? A. No depression at all.

Q. And in saying that he is nearly sane, practically sane—pretty nearly normal, can you tell us a little better what you mean by normal, what standard you take when you say normal?

A. Well, he has no hallucinations, delusions or illusions, his ideas as to time and place are good, his memory is good, he remembers,—for instance, they brought a bundle of clothing and he inquired about his clothing, and when he was going to be discharged.

Q. If you were to have that man submitted to you without any previous connection with the case, ex-

(Testimony of Dr. W. A. Schwallie.)

amining him as though in the first instance yesterday—his condition yesterday, [140] and had no previous knowledge about him, would you have found any reason in your mind to suspect he was not normal?

Mr. DAVIS.—I object to the question on the grounds that it is improper cross-examination, not based on the real facts, he is asking for an opinion as to what he might think, provided he didn't know the man had received a previous injury and had no knowledge of what took place and so forth.

Mr. WARREN.—Withdraw the question.

Q. From your examination of that man yesterday, Doctor, basing your statement now upon the examination you made yesterday, did you find anything concerning him that indicated that he was not normal? A. I found nothing that indicated that.

Q. Does the fact that his memory may have been, or was, somewhat hazy *has* to some parts of the accident, some facts or circumstances connected with the accident, in any way detract from your statement already made that you consider him normal, that is, did the fact that in the past he was hazy as to some circumstances in the past detract from your opinion as he now is, he was apparently normal?

A. I didn't understand.

Q. I will put it another way: Isn't it common that a person who has undergone an unbalanced condition of mind frequently unable to recollect some particular facts and circumstances connected with an accident or with the incipiency of a mental disturbance?

(Testimony of Dr. W. A. Schwallie.)

A. Yes, that frequently occurs. That wouldn't detract from my opinion as to his sanity at the present time. [141]

Q. How did you make your examination of this man yesterday, through an interpreter?

A. Through an interpreter.

Q. And who was the interpreter?

A. Mr. Ocampo was the first interpreter.

Q. That was yesterday morning?

A. Yesterday morning.

Q. And yesterday afternoon?

A. And the guardian,—I forget his name; Adriano, I think.

Q. Now, you said that this man asked to be examined so as to be released from the asylum?

A. He did.

Q. How did he make that request?

A. Well, we have got to speak in pantomimes to a great extent.

Q. You say his guardian made the same request?

A. He did.

Q. What did he say to you at that time concerning that?

A. Well, he wanted to know when the commission would be up to examine him.

Q. Yes, and what did he say about the man's condition, if any, in his judgment?

A. That he thought the man was all right—

Mr. BANKS.—We object to the question as to what the guardian thinks or any opinions he may have expressed, it is not shown that the guardian is

(Testimony of Dr. W. A. Schwallie.)

an expert at all.

The COURT.—Overrule the objection.

Mr. BANKS.—Exception.

Mr. WARREN.—What did he say about it, Doctor? You answered that he said it was all right.

[142]

A. Yes, sir.

Q. What did you tell him about the time the commissioners would meet?

A. I told him that lay with the commission, the chairman usually states the time and date and that I would notify him at the time of the—when the examination was to be held.

Q. People are discharged from the asylum only upon the order of the Commissioners on Insanity?

A. Yes, sir; that is right.

Q. And has a hearing of the commissioners as to his sanity been held in that case?

A. There was a meeting held yesterday on three cases. Two previous cases were considered but one of the commissioners was not present, that is, Doctor Cooper, I will name them, and the other commissioner, Mr. Warren, did not consider himself eligible. Doctor Herbert passed on the case.

Q. Doctor Herbert examined the man and he still is to be examined by Doctor Cooper?

A. Yes, I expected him this morning, or last night. He did not arrive, I suppose he is busy with the draft.

Mr. WARREN.—That is all.

Redirect Examination of Dr. W. A. SCHWALLIE.

Mr. DAVIS.—Mr. Warren, counsel in this case,

(Testimony of Dr. W. A. Schwallie.)

is one of the commissioners who decides whether the man should be [143] released or not?

A. No, he did not consider himself eligible.

Q. But I say he is one of the commissioners?

A. He is one of the commissioners.

Q. And he refused to act, counsel in this case refused to act because of his connection with this case?

A. He did.

Q. Well, the man is still in the insane asylum, he hasn't been discharged? A. Yes.

Mr. DAVIS.—I just wanted to make that plain, Doctor, thank you. Mr. Warren, if you will admit that the other doctor will testify the same as Doctor Schwallie there will be no need to bring him here.

Mr. WARREN.—If it is practically a repetition of this witness' testimony I will admit that.

Mr. DAVIS—What is his name, Doctor?

A. Benjamin A. Michaels.

Mr. DAVIS.—It is admitted that Doctor Benjamin A. Michaels will, when sworn, testify to the same effect as Doctor Schwallie with reference to the incarceration, examination and condition of this insane person, Anatalio Peneyra.

Mr. WARREN.—All right.

The COURT.—I would like to ask a question.

Q. You say you have been treating this man Peneyra, the libelant, whatever his name is, since when? A. January 5th.

Q. If I understand your testimony, the effect of what you say [144] is his insane condition may have been caused by the fall and may not, you have

(Testimony of Dr. W. A. Schwallie.)

no opinion of that as to how his insane condition was produced?

A. It could produce that mental state.

Q. The fall could have produced that mental state?

A. Yes, sir.

Q. But you have not said what in your opinion did produce that mental state? A. No.

Q. And how have you been treating this man since he came to the asylum, what kind of treatment have you been giving him?

A. Nothing special,—good food, diet.

Q. Well, that treatment would be the same without regard to what was the cause of his condition at the time he came, without regard to whether it was caused by a fall or something else, the treatment would be the same?

A. I didn't just catch that last?

Q. You say he has been treated by you ever since he has been in the asylum? A. Yes, sir.

Q. And that your treatment has been nothing particular?

A. No, probably the wound was not healed. My assistant takes care of that.

Q. But giving him good food? A. Very true.

Q. Yes?

A. And taking good care of him. The wound healed naturally, probably they applied some antiseptics or something like that. [145]

Q. What I asked you was, was that treatment, was that the treatment that was proper for his condition without regard to whether it was caused by a blow,

(Testimony of Dr. W. A. Schwallie.)

by a fall or something else?

A. We did not see any other treatment to make, no other treatment, only let nature, if there was no extravasation of blood in the brain.

Q. You found no pressure?

A. None at all; no, sir.

Q. Found none.

A. No depression in the skull. There was a scalp wound.

Q. The wound is entirely on the scalp?

A. Practically.

Q. No depression at all? A. No depression.

Q. Any clot on the brain or anything? Could you tell about that?

A. No, we *can* tell. There is paralysis usually when we have a clot; there is paralysis of some kind, but none in this case, either arm or leg.

Q. The only thing to do was to take good care of him?

A. Yes, and good food. My assistant advised me that he treated the wound locally.

Q. He ate and slept regularly?

A. Ate and slept regularly every day. That was a little wound treated locally with antiseptics and it healed naturally.

Mr. DAVIS.—If he had constitutional troubles would he have recovered by simply the treatment you gave him?

A. Well, now, that is—we have patients recovering— [146]

Q. No, I am asking you would he have recovered

(Testimony of Dr. W. A. Schwallie.)

if he had constitutional troubles?

A. I could not say that.

Q. Wouldn't you administer other treatment if he had constitutional troubles? A. Well, yes.

Q. And in answer to Judge Vaughan you are not prepared to deny there is no clot on the brain? The only thing you say is there was no paralysis. Are you prepared to say absolutely there is no clot on the brain?

A. Well, we haven't made an X-ray examination of it.

Q. No, and you are not prepared to say there is not?

A. No; when there is a clot on the brain there is usually paralysis.

Q. But you are not prepared to say there is not any clot on the brain?

A. Well, there is usually paralysis when there is a clot on the brain.

Q. Well, are you prepared to state, Doctor, that there is no such a thing, absolutely?

A. From my medical experience I would say that there is no clot on the brain.

Q. You think there is not but you are not sure, are you sure, Doctor, about that? A. Yes, sir.

Q. Absolutely?

A. I am as sure—as I say, we have not looked into the brain.

Q. Did he exhibit any sylphiletic symptoms at—of any kind? [147]

A. He has not been tested for syphilis.

(Testimony of Dr. W. A. Schwallie.)

Q. No symptoms of that kind apparent, is there?

A. No, no, symptoms of syphiletic syphilis.

Q. Would he have recovered if he had syphilis, would he have recovered by the treatment you gave him? A. No, I don't think so.

Q. You would have given other treatment if he had syphilis, wouldn't you? A. I would.

Q. Do you know of any other causes you can state for insanity except a fall and wound on the head, and that accident?

A. I don't know of any other cause. I would have to get that from the previous history of the case.

Mr. DAVIS.—That's all.

Mr. WARREN.—That is all, your Honor. [148]

**Testimony of Adriano Borha, for Libelant (Recalled).**

Direct examination of ADRIANO BORHA, for libellant, recalled.

Mr. DAVIS.—This is the little girl belonging to this man. Anatalio Peneyra? A. Yes, sir.

Q. That you told about here when you were in court before? A. Yes, sir.

Q. How old is she?

A. She is about between six and seven.

Q. You were up to the insane asylum yesterday afternoon; did you make any request to have this man released from there?

A. No, I just translated his request that he begged the officers of the asylum whether they can let him off, and I just translated his words.

(Testimony of Adriano Borho.)

Q. But you did not make any request to have him discharged yourself? A. No, sir.

Q. It just come from him, eh?

A. Yes, sir, I did.

Q. Yes; where is his sisters now—on Kauai?

A. Sisters. Yes, in Kauai.

Mr. WARREN.—He is trying to impeach his own witness. I move it be stricken, I object to it.

Mr. DAVIS.—Well, that is all.

I have two witnesses from Kauai to show that this man was in sound physical and mental condition, and with that [149] evidence I will close my case as soon as I get the evidence here.

Mr. WARREN.—I take exception to that; I want the libellant to finish before I put on my case. I submit if he has anything more he can bring it in rebuttal, if it is proper.

The COURT.—Yes, I am not going to require Mr. Warren to put on testimony until you are finished, Mr. Davis.

Mr. DAVIS.—I want a continuance in this case then.

Mr. WARREN.—I have got three witnesses out here who are very busy from the ship, and I don't propose to have them come back again if I can help it.

The COURT.—Do you close your case, Mr. Davis?

Mr. DAVIS.—No, I am asking for time to bring my witnesses here from Kauai.

Mr. WARREN.—These witnesses of mine are from the ship and were notified to be here to-day.

[150]

**Testimony of James Gregory, for Libelee.**

Direct examination of JAMES GREGORY, for libellee, sworn.

Mr. WARREN.—You are the master of the Inter-Island steamship "Kinau,"—you were on the 19th of December last? A. Yes, sir.

Q. And you recall the occasion of an accident to a Filipino on the "Kinau" at Nawiliwili harbor at that time? A. Yes, sir.

Q. Where were you when you first knew the man had been injured?

A. Beg pardon—what did you say?

Q. Where were you when you first heard that the man was injured, where were you?

A. I was on the wharf at Nawiliwili, at the upper end of the wharf.

Q. Meaning what? A. The shore end.

Q. When you saw him, what was he doing there, if anything?

A. He came along the wharf and the freight clerk told me he met with an accident aboard the ship.

Q. What did you do?

A. I immediately went to the purser and told him to get an automobile and take him to the hospital.

Q. Did you speak to the man himself?

A. No, sir, I did not.

Q. Now, at the time—that was done, was it, he was sent to the hospital right away?

A. Yes, sir, right away. **[151]**

Q. At that time can you tell me what was the con-

(Testimony of James Gregory.)

dition—withdraw it. State whether or not at that time it was light or dark. A. It was light.

Q. At the wharf when the man arrived and you saw him there? A. It was light.

Q. Now, can you give a little better idea what you mean by light by comparison, for example, by the light outside now.

A. I saw the man coming down the wharf. It was not as light as it is now, but they had no need of lights or anything like that. We went to the little wharf office there and I spoke to the purser, he was working there but he had no lights.

Q. Has that wharf office any windows?

A. Yes, sir.

Q. Which way do they face?

A. I think one window faces north, and then there is a little window where the passengers come in and get tickets, and he was working there at his desk.

Q. And you went inside the room?

A. I just went to the room; the door was open and I told him a man met with an accident and to get an automobile right away and send him to the hospital.

Q. How near the window was the desk where he was working?

A. The desk is like this here, and the door there, and the desk is there. You come in the door here, and here is the desk here, and here is a little window here where people get their tickets, and here is a little window here. [152]

Q. How large a window?

(Testimony of James Gregory.)

A. Oh, quite a large sized window, about half the size of this.

Q. Half the size?

A. Well, not half the size.

Q. Compared with the door behind you.

A. Something like that.

Q. About the size of one of those two doors?

A. Yes, sir.

Mr. WARREN.—Cross-examine.

Cross-examination of JAMES GREGORY.

Mr. DAVIS.—Captain Gregory, you don't know what time it was?

A. Well, I should judge about—

Q. No, not your judgment; I want to know if you really know what time it was.

A. I could not positively give the real time; it was about half-past five o'clock—twenty minutes past five.

Q. Half-past five?

A. Somewhere between that time.

Q. Well, you didn't look at your watch at the time, did you, Captain? A. I did not.

Q. Sure it was after five o'clock, though?

A. Yes, sir.

Mr. DAVIS.—That will be all for Captain Gregory; thank you. [153]

**Testimony of David Kamaiopili, for Libelee.**

Direct examination of DAVID KAMAIOPILI, for libellee, sworn.

Mr. WARREN.—Mr. Kamaiopili, on the 19th of

(Testimony of David Kamaiopili.)

December you were purser on the Inter-Island steamship "Kinau"? A. Yes, sir.

Q. And at that time she was at Nawiliwili, on Kauai?

A. I believe on the 18th, wasn't it, Mr. Warren?

Q. 18th or 19th. A. 18th.

Q. At any rate, it was the occasion when a Filipino had fallen into a hatch on the ship and brought ashore and taken to the hospital? A. Yes, sir.

Q. Where were you when you first had information that an accident had occurred?

A. I was in the company's ticket office checking up my tickets and coin.

Q. What were you doing there?

A. Checking up my tickets and coin.

Q. And what was the state of the day as to light or darkness, was it light or dark where you were working in the ticket office?

A. Well, in checking up my tickets and money I didn't use any lights in the office.

Q. Well, did you have plenty of light for your purpose? A. Yes, sir; I had sufficient light.

Q. What sort of work exactly were you doing? [154] By that, were you merely checking off the items or doing any writing?

A. Checking up my passengers and counting up my coin, the money I collected.

Q. Doing any writing or reading?

A. Well, I didn't have to do any writing.

Q. Reading names?

(Testimony of David Kamaiopili.)

A. Yes, sir; I had to see who I had down on the passenger list.

Q. Which way did the windows in that room face, what direction of the compass?

A. About north and northeast.

Q. On that west side are there any windows?

A. On the west; no.

Q. Can you give us your best judgment as to what time it was when you were told that an accident occurred, and you were to take the man to the hospital, or send him there?

A. About, between five and five-thirty, I believe it was.

Q. Yes, you didn't look at your watch?

A. No, I didn't.

Q. What did you do when you were requested to send him to the hospital?

Q. Well, the captain came in to me and said, "Purser, you better get a machine; there's a man hurt," and I immediately went to the garage,—it was only a hundred feet away,—and ordered a car. The man was just walking up from the wharf, and I told the freight clerk to get on the machine with this man and take him right up to the hospital.

Q. Now, when did you go back to the ship, did you await the **[155]** return of the freight clerk before you went? A. Oh, yes.

Q. And about how long a time had passed from the time you started off that man to the hospital before he, before you started him off to the hospital with the man and you went to the ship again?

(Testimony of David Kamaiopili.)

A. The freight clerk?

Q. Yes, when did he get back to the ship?

A. Well, it was fully a half an hour, or a little more.

Q. Now, at that time that you went back to the ship, how was it as to light or darkness?

A. Well, it was still light so that I didn't have to use any electric light.

Cross-examination of DAVID KAMAIOPILI.

Mr. DAVIS.—Have you ever been aboard the "Kinau"?

A. Have I been aboard the "Kinau"?

Q. Yes. A. I am working on there.

Q. Yes, and you know between-decks there in the steerage where this hatch was where the man fell down, is that as light a place as where you were working in your office?

A. Well, I guess you would have just as much light as where I was working in the office.

Q. Swear to it?

A. Yes, sir, I'll swear to it, because the two ports were open. **[156]**

Q. Yes.

A. So that they get sufficient light down to the 'tween-decks at the bottom of the hatch.

Q. Yes, and the office where you were working has a door and two or three windows, how many windows?

A. Well, two windows and a door, well—

Q. No, that office I am talking about.

A. The office has a door and two windows and my

(Testimony of David Kamaiopili.)

office window. Three windows and a door and my office window.

Q. And how high a ceiling,—covered over with boards, ain't it?

A. Yes, about as high as from here to that green border.

Q. What green border do you mean?

A. Above the white.

Q. I see, way up there. How many feet is that?

A. I should judge that is about eighteen feet.

Q. Yes, and what's the distance between the decks of that vessel there? A. Couldn't tell you.

Q. Isn't it only about five or six feet?

A. I think more than that.

Q. Well, how much more?

A. Couldn't tell you.

Q. Will you swear it is ten feet?

A. I couldn't swear to that.

Q. It isn't as high as the office ceiling is it, by any means? A. I couldn't swear to that.

Q. Couldn't swear? You don't know. Will you swear it is as high as the office ceiling between-decks there?

A. Between the bottom hatch and the top of the hatch, you see, [157] there is two decks—

Q. Where the man was standing there on the upper deck I am talking about, he was down between-decks, wasn't he? A. Yes.

Q. Exactly; and I am asking you the distance between the lower deck and the covering over it, that's

(Testimony of David Kamaiopili.)

of course the upper deck,—do you know anything about the distance?

A. I think the 'tween-decks is just about three or four feet over my head.

Q. That would be about seven feet, about eight feet, eh? If it is three feet higher than you, it would be about eight feet, wouldn't it?

A. About eight or ten feet.

Q. And your office is about eighteen feet high?

A. Well, I am talking of the 'tween-decks. Of course the lower deck is another.

Q. I am talking between-decks.

Mr. WARREN.—Let him explain that.

A. I am trying first to give you the height between the upper deck and the 'tween-deck. Now, from the 'tween-deck to the lower deck is about the same distance.

Mr. DAVIS.—Yes, that would be about eight feet, wouldn't it?

A. To tell you the truth, I don't know where the man hit, whether he stopped at the 'tween-deck or the lower deck; there's two decks, you know.

Q. I know, but isn't it, where that hatch is isn't that the lower 'tween-decks, isn't there a top deck goes over that place where he went in that port?

A. Yes, sir. [158]

Q. Well, that's where he was standing, wasn't it?

A. Yes, sir.

Q. Well, I am asking you how high it was from the place where he was standing to that place that covers it over there.

(Testimony of David Kamaiopili.)

A. I see. Oh, that deck isn't as high as this office.

Q. No, of course not, by how many feet,—it ain't seven feet, is it? A. Oh, yes, all of that.

Q. Is it eight,—is it eight feet?

A. I should judge between ten and twelve feet.

Q. Well, you never measured it? A. No.

Q. But it isn't as high as the office ceiling,—sure of that? A. No.

Q. And only these two ports at the time open?

A. I couldn't swear they were open at the time.

Q. No, there may have been only one open, eh,—you don't know how many were open?

A. Couldn't tell you.

Q. And you don't know whether it was light or dark on board of that steamer or not.

A. At that time no; I couldn't tell you.

Q. No, you couldn't tell. There is one thing about it, in your office there you didn't do any reading at all—writing I mean, just checking, wasn't you?

A. Well, I had to read to see what passengers I had on the passenger list. I had to put my figures down while counting my coin.

Q. You were close to the window?

A. Oh, yes. **[159]**

Q. Sure, right up against the window; was the window open?

A. My desk was right at the window.

Q. Sure, and was the window open?

A. The one selling tickets was, but that on my right wasn't.

(Testimony of David Kamaiopili.)

Q. And you were right up close against the window? A. Yes.

Mr. DAVIS.—That's all. [160]

**Testimony of O. H. Otterson, for Libelee.**

Direct examination of O. H. OTTERSON, for libellee, sworn.

Mr. WARREN.—Mr. Otterson, you are the chief officer of the Inter-Island steamship "Kinau"?

A. Yes, sir.

Q. And you were on December 19th, last year?

A. I joined the ship on the 17th of December.

Q. Were you on board the vessel at Nawiliwili?

A. Yes, sir.

Q. And that was the occasion when a Filipino passenger fell into the hatch into the 'tween-decks?

A. Yes.

Q. Where were you when you first learned of that accident?

A. I was standing at the top of the gangway, receiving the passengers coming aboard ship.

Q. After the accident you saw the injured man?

A. I did,—saw who?

Q. This man that was hurt.

A. We picked him out of the hold and put him in the boat.

Q. Did you see him before that when he came aboard ship?

A. I am not positive about seeing him before he came aboard ship.

Q. Did you see his little girl?

(Testimony of O. H. Otterson.)

A. Yes, that girl I saw.

Q. This is the little one here, where was she when you saw her?

A. Sitting on a bench on the upper deck on the port side. **[161]**

Q. Alone, or anyone with her?

A. At the time I seen her she was sitting alone with two bundles of matting alongside of her.

Q. When you learned of the accident—withdraw that. Do you know whether or not this little girl came up the gangway past you to the upper deck?

A. It's one of the rules on board the Inter-Island boats that parents come up first and pass the children up.

Q. Your duty then was at the head of the gangway? A. Yes, sir.

Q. When you were told of the accident, what did you do?

A. Well, I went down below to the hallway of the companion-way and with the third mate went in the hold and the two of us picked the man up and put him in the boat lying alongside discharging freight and then took the girl and put her in the boat that was alongside the gangway.

Q. When you went in to the 'tween-decks hold—withdraw that. Had you on that day near to the time of the happening of the accident been in the 'tween-decks hold before?

A. About fifteen minutes before the passengers begin coming off to the ship, I always make a round of the ship, and I was in the 'tween-decks then.

(Testimony of O. H. Otterson.)

Q. How long did you stay in there that time?

A. Oh, about four or five minutes.

Q. And that was fifteen minutes before the accident?

A. About fifteen minutes before the accident.

Q. And after you left there, where did you go?

A. Right up to the upper deck and sent the third mate forward [162] to receive some automobiles.

Q. What was the occasion that you were stationed at the head of the gangway to receive passengers as they came on, how did you come to leave and go to the 'tween-decks and then come back?

A. To see that everything was all right down there, the hatch on and the chain around it.

Q. You went down there this time for that purpose? A. Yes, sir.

Q. What did you find as to the condition of the hatch?

A. The hatch was on and the chain around.

Q. Did you at any time say anything to the bos'n reprimanding him on account of the chains around that hatch?

A. Yes, shortly before that when we arrived in Nawiliwili.

Q. Just tell us about that, will you?

A. He had no chains around the hatch and—

Mr. DAVIS.—I submit what he did before the accident happened and what he said is not evidence in this case, it looks like manufactured testimony. It's incompetent, irrelevant and immaterial, and not

(Testimony of O. H. Otterson.)

tending to prove or disprove any of the issues in this case.

The COURT.—Overrule the objection.

Mr. DAVIS.—Exception.

Mr. WARREN.—Read the question, please.

(Last question read.)

A. Shortly after our arrival in Nawiliwili I went down there and there were no chains around the hatch.

The COURT.—Shortly after your arrival in Nawiliwili there [163] were no chains around the hatch?

A. I went down there and there were no chains around the hatch, and I gave the bos'n a calling down and told him to put the chains on—told him to put the hatches on and the chains around the hatch.

The COURT.—To put the hatches on the chains?

A. To put the hatches on and the chains around.

Mr. WARREN.—Did you give him any reason at that time why the chains should be around?

A. To keep the passengers from making their beds on top of the hatch, because after they once make their beds you can't get them off again when you want to put freight in the hold.

Q. How long was that before the accident?

A. Shortly after we got to Nawiliwili.

Q. Yes.

A. And I made a round afterwards and everything was all right.

Q. About how long before the accident was that?

A. About forty minutes or so.

(Testimony of O. H. Otterson.)

Q. Now, between that time that you were in the 'tween-decks hold and the time of the accident, did you go in again?

A. I went down about fifteen minutes before the first boat came off, when it left the wharf with the passengers.

Q. That was the second time?

A. Yes, second time.

Q. What did you find then with respect to the hatches? A. The hatches were all right.

Q. Where were the chains?

A. Around the hatches and a rope on one side.

Q. When you went down on call that an accident had occurred, [164] where were the chains then?

A. The chains were still around the hatch. The only thing that was removed was the rope on one side.

Q. Which side of the hatch was that?

A. On the port side.

Q. And that rope was removed at the time that you went down at the time of the accident?

A. Yes, sir.

Q. And the accident had happened when you went down there?

A. Yes, sir; the accident had happened.

Q. Did you do anything with respect to this little girl who was on the upper deck, do anything with her?

A. No; all we did with her was to find out that she was the daughter of the man that fell in, and sent her

(Testimony of O. H. Otterson.)

ashore in the passenger boat and took the baggage that she had with her.

Q. When you went down at the time of the accident, right after it occurred, to help, did you say anything to the bos'n about the accident?

A. No, I never said anything to him; just asked him how it happened.

Q. And what did he say?

A. He just said the man fell in.

Q. It has been testified in this case that you told this man it was his fault for leaving the hatch open. What do you know about that?

A. I don't know anything about that.

Q. Did you tell him any such a thing?

A. No, not that I remember of. **[165]**

Q. Did you tell him anything at all except to ask him how it happened?

A. The only thing I asked him, I asked him how it happened. "Well," he said, "I told them to get away, but this fellow fell down."

Q. Now, as to the state of light or darkness, I want to ask you when that accident occurred and you went down there to assist, how was it, light or dark in the 'tween-decks there? A. Light; it was light yet.

Q. How light—can you give us an idea?

A. I could see everything without having the lights switched on down below.

Q. Any electric lights burning?

A. Burning in the cabin; yes.

Q. But in the 'tween-decks, did you notice?

(Testimony of O. H. Otterson.)

A. No, not in the 'tween-decks, no need of lights in the 'tween-decks.

Q. Have you any idea, can you give us your best judgment as to the time of day the accident occurred?

A. He was sent ashore about five-thirty; it must have been about five twenty-five or a little before that, because he was taken right out of the hold and sent right ashore.

Q. You didn't look at your watch?

A. No, I didn't look at the watch, but I got the time I sent the boat ashore.

Mr. WARREN.—Cross-examine. [166]

Cross-examination of O. H. OTTERSON.

Mr. DAVIS.—You say the lights were burning in the cabin, Mate. Do you know who turned them on?

A. The engineer starts the dynamo in order to get the fans going to air out the rooms, and at the same time the lights in the cabin are turned on.

Q. You don't know just what time it was, Mate?

A. About twenty to five, I guess.

Q. You don't know the exact hour, you didn't look at your watch? A. No, I didn't do that.

Q. And you are only just guessing about it?

A. But that time can be had from the engineers.

Q. Never mind about the engineers; you didn't know what time it was?

A. I know it was before the accident occurred.

Q. Yes, but what time it was when the accident actually occurred you don't know, you never looked at a watch?

(Testimony of O. H. Otterson.)

A. I know what time the man was sent ashore; he was sent ashore just after he was taken out of the hold.

Q. You didn't look at your watch?

A. Probably five minutes—

Q. But you didn't look at your watch?

A. The time was taken by the quartermaster.

Q. Never mind about the quartermaster, but you yourself didn't [167] look at your watch?

A. No, the time was taken by the quartermaster.

Q. I didn't ask you about the quartermaster; I asked you whether you looked at your watch?

A. I didn't look at a watch.

Q. No. How high is the ceiling,—say this is the floor of the deck, eh? Now, how high is it from where, standing there 'tween-decks up to the covering over the deck?

A. You mean from one deck to another?

Q. Yes, from one deck to another.

A. Five foot eight, or five foot eight and a half.

Q. Five foot eight or five foot eight and a half?

A. Yes, sir.

Q. I thought that was about it. Now, we will suppose that this witness-stand represents the hatch, see? Now, on the port-side of the hatch there was a rope instead of a chain, and that rope was down when you saw it.

Mr. WARREN.—Object to that.

Mr. DAVIS.—I asked if it was a rope instead of a chain.

A. Yes.

(Testimony of O. H. Otterson.)

Q. Now the rope was down?

A. Yes, because they were taking in cargo.

Q. On the port side? A. Yes.

Q. Now, which side of that hatch the man fell down you don't know because you wasn't there.

A. I wasn't there.

Q. And you didn't see the accident?

A. No, I didn't see the accident.

Q. And the rope was down and the whole side was open at the [168] time when you came down right after the accident?

A. Yes, after the accident when I came down the rope was down.

Q. And the man was insensible.

Mr. WARREN.—Objected to, your Honor, as not proper cross-examination.

Mr. DAVIS.—Was the man sensible or insensible?

The COURT.—The objection is that that is not proper cross-examination. He has not undertaken to testify anything about the condition of the man, there is no question about that.

Mr. DAVIS.—You took him out of the hold and put him in the boat and took him ashore?

A. Yes, sir.

Q. You assisted in that?

A. Yes, sir, I assisted in that.

Mr. DAVIS.—That will be all.

Redirect Examination of O. H. OTTERSON.

Mr. WARREN.—I want to ask you regarding this five feet eight and a half inches. Just what

(Testimony of O. H. Otterson.)

place have you in mind when you gave that distance of five feet eight and a half inches?

A. About five feet eight or eight and a half, I judge by my own height. My height is about five feet four and a half, and that's about four inches more.

Q. From what place to what other place? [169]

A. From one deck to another.

Q. And how high are you?

A. Five feet four and a half.

Mr. WARREN.—That is all.

Mr. DAVIS.—Come down and see the ship, your Honor.

Mr. WARREN.—I shall be very glad, if your Honor will, and size it up.

Mr. WARREN.—What time do you sail?

A. Five o'clock.

Mr. DAVIS.—I would ask for a continuance until Friday morning.

Mr. WARREN.—I would like to say that at the time Peneyra came here he had about three hundred dollars.

Mr. DAVIS.—The whole thing was explained to Judge Poindexter and it's for the purpose of keeping this little girl, in the hands of the guardian to keep this little girl.

Mr. WARREN.—And I want to ask leave to produce the discharge of this man from the asylum as soon as it is passed on by the commissioners as to the condition of this man.

The COURT.—Continuance is granted until Fri-

day at 10 o'clock, a week from to-day.

The court then continued the hearing of this cause until Friday, May 10, 1918, at 10 o'clock A. M. [170]

*In the United States District Court, in and for the Territory of Hawaii.*

AD.–172.

ANATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian at Litem,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Boats, Furniture and Appurtenances,

Libellee.

Honolulu, H. T., May 10, 1918.
10:00 A. M.

The COURT.—In view of the fact that the other interpreter is inaccessible, we will go ahead with this man, who is the interpreter at the Immigration Station.

Mr. WARREN.—He is an interested party in the case, being the guardian of the child appointed by the court, he is a valid agent. I certainly don't want, your Honor, to delay matters, but I do object to the plaintiff in this case acting as the interpreter.

Mr. DAVIS.—Ocampo is here. [171]

**Testimony of Mrs. Eduarda Penaira, for Libelant.**

Direct examination of Mrs. EDUARDA PENAIRA, for libellant, sworn.

Mr. DAVIS.—(Through Interpreter, Mr. A. F. OCAMPO.) Q. What is your name?

A. Penaira.

Q. What is her other name,—Katherine or what?

A. Eduarda.

Q. Now, where does she live, or, where do you live? A. Camp 7.

Q. Camp 7 where? A. Eleele, Kauai.

Q. And did you come from Kauai this morning on the steamer? A. Yes.

Q. Do you know Anatalio Peneyra?

A. Anatalio?

Q. Yes. A. Yes.

Q. The father of that little girl? A. Yes.

Q. How long have you known him?

A. Ever since he was born.

Q. Ever since he was born; how long have you known him on the Island of Kauai?

A. Since he came here over a year ago, that is, the month of August.

Q. Do you remember the 19th day of December, 1917, when Peneyro started to come to Honolulu?

A. I do.

Q. Yes; did you see him on that day before he started?

A. Yes, sir; he left my home. [172]

Q. Left your home; did he ever have any trouble mentally or physically, before that day?

(Testimony of Eduarda Penaira.)

Mr. WARREN.—Objected to as leading, and the witness is not competent.

Mr. DAVIS.—She seen him every day; her evidence can go in for what it is worth.

The COURT.—Overrule the objection.

Mr. DAVIS.—Did he have any mental or physical trouble before that day? I will follow that up.

A. No.

Q. What was he doing there before the 19th of December, what was he doing,—working on a plantation, or what?

The COURT.—Don't lead the witness.

A. He was a laborer.

Mr. DAVIS.—Labor where?

A. Plantation laborer.

Q. Did he live in the same place that you did, or where, how close to it?

A. Same camp, but at a different house.

Q. Same camp but different house; did you see him every day? A. Yes.

Q. For a period covering how long before the 19th of December?

A. Ever since he arrived from the Philippines two Augusts ago.

Q. And she saw him every day for two years?

A. Yes.

Q. Yes, and now what was the—is he a married man? A. His wife is dead.

Q. His wife is dead; now, you say you saw him every day until he started to come to Honolulu?

[173]

(Testimony of Eduarda Penaira.)

A. Yes, sir.

Q. Did he visit *hour* house, your room in the camp? A. Yes.

Q. And did you visit him? A. Yes.

Q. Yes, and that's his little girl there, is it?

A. Yes.

Q. What was his general reputation around the camp among the Filipino people there?

Mr. WARREN.—Objected to, your Honor, as incompetent, irrelevant and immaterial.

Mr. DAVIS.—Question withdrawn.

Q. Was he working every day or not?

A. Yes, every day.

on the 19th of December, 1917?

Q. Do you know why he was coming to Honolulu

Mr. WARREN.—Objected to as immaterial.

Mr. DAVIS.—I think it is competent.

The COURT.—Go ahead.

Mr. DAVIS.—It is only to ask if he had business there, your Honor.

A. Yes, I do.

Mr. DAVIS.—What was it?

A. To go back home.

Q. Oh, he was going back to the Philippine Islands, I see. A. Yes, sir.

Q. And he started for that purpose? A. Yes.

Q. Was there anything wrong with him at any time, did you notice anything wrong with him, mentally or physically from the time that you knew him —during all the time that you knew him down on that plantation?

(Testimony of Eduarda Penaira.)

Mr. WARREN.—Object to that question as incompetent, the witness [174] not being qualified to give an opinion as to his mental competency, and further that it is ambiguous and indefinite.

The COURT.—The presumption is that all people are sane until proven otherwise. Overrule the objection.

Mr. DAVIS.—Just state if you noticed anything wrong with him.

A. I didn't observe his mental condition.

Q. Did you see anything wrong with him?

A. No.

Q. But you saw him every day? A. Yes.

Q. Did you ever hear anybody question his sanity?

Mr. WARREN.—Objected to, your Honor, as immaterial and incompetent, hearsay.

Mr. DAVIS.—Because if there was anything wrong with him it would be known there.

Mr. WARREN.—You can't prove reputation like that.

Mr. DAVIS.—Hear anybody say he was acting queer or anything like that?

Mr. WARREN.—I think that is immaterial.

Mr. DAVIS.—I will take your Honor's ruling on it.

Q. Did he ever do any queer thing there that you noticed during the time you knew him?

Mr. WARREN.—Same objection.

Mr. DAVIS.—Out of the ordinary?

The COURT.—Overrule the objection.

A. No.

(Testimony of Eduarda Penaira.)

Mr. DAVIS.—From your knowledge of this man and from what you have seen of him from time to time during all that time [175] of two years, and from your intercourse with him and conversations with him, I want you to say whether he was sane or insane.

Mr. WARREN.—The same objection, your Honor; the witness cannot give an opinion as to whether the man was sane or insane.

Mr. DAVIS.—I submit she can; from observation or otherwise.

Mr. WARREN.—I will rest on my objection.

The COURT.—I think the question has been answered already. A nonexpert witness can testify whether a person is sane or insane. I think the matter is fully gone into.

Mr. DAVIS.—I will take your Honor's ruling. Take the witness and cross-examine.

Cross-examination of Mrs. EDUARDA PENAIRA.

Mr. WARREN.—(Through Interpreter.) Q. This Camp 7 at Eleele, what sugar plantation is that?

A. Sugar-cane plantation.

Q. What is the name of the company?

A. I don't know.

Q. Who is plantation boss, or manager?

A. I don't know his name, but I know the Luna's name.

Q. You know the Luna's name, but you don't know who is manager of the plantation?

A. I do not.

(Testimony of Eduarda Penaira.)

Q. Now, you say this Anatalio worked every day prior to the time he left for Honolulu? [176]

A. Yes, very few Sundays that he doesn't work.

Q. Now, when he didn't work what was the reason —was he sick or was he just laying off?

A. Well, he works almost every day, sometimes he work on Sunday, and then take a rest—

Q. No; my question was, when he did not work.

A. And sometimes he goes out and gets firewood.

Q. When he didn't work, what was the reason? That is my question.

A. To get some firewood.

Q. So that he was never sick at any time at all that you remember, in that whole year and a half or two years. A. No, never sick.

Q. Never had treatment from the plantation doctor there? A. No.

Q. Now, do you know that or is that just what you think?

A. Ever since arriving at this plantation I did not observe that he was sick; I didn't know he was sick.

Q. Well, could he have been sick and you not have known it?

A. I am certain he never been sick ever since he arrived.

Q. All right, you know that of your own knowledge? A. Yes.

Q. All right; how many people living together in the house with you? A. Crispinio Pinairo,—

Q. I don't want their names, I want to know the number of people. A. Four at that time.

(Testimony of Eduarda Penaira.)

Q. Now, Anatalio would come over from his house to your house [177] and visit and talk with the people there? A. Yes.

Q. Did he sit down and smoke, or walk around—was he active or quiet?

A. Whenever he goes to the house he sitting down there and talk with us, and when they are through he went to his home.

Q. When you left Kauai to come over here and testify, did you know what you were coming for?

A. I do.

Q. How did you find out?

A. Yes, because those friends that supposed to go with him to the Philippines wrote me a letter and stated the occasion.

Q. Who was that friend?

A. Frederico Pasco.

Q. Frederico Pasco?

A. He has gone back now to the Philippines.

Q. When did he go?

A. I do not recollect the day that he left for the Philippines, but they left the same day.

Q. I am asking you when you left the plantation to come over to Honolulu here and testify in this case, did you know what you were coming for?

A. I do.

Q. What were you coming for?

A. Anatalio Peneyra.

Q. Did you know what you were coming to testify about? A. Yes.

Q. How did you find that out?

(Testimony of Eduarda Penaira.)

A. The lawyer came and notified me to come to Honolulu.

Q. What did the lawyer tell you? [178]

A. You go to Honolulu because the Judge there needs you for Anatalio Peneyra.

Q. Yes, did the lawyer talk with you about what kind of testimony he wanted, or what you were going to testify to when you got on the witness-stand?

A. He did not.

Q. After you got here did you have a talk with anybody here about what you were going to testify about this morning? A. No.

Q. Not with anybody, not even with Judge Davis?

Mr. DAVIS.—I didn't see her; the boat just got in.

A. No.

Mr. WARREN.—With Adriana Borha?

A. No.

Mr. WARREN.—I see; that is all.

Redirect Examination of Mrs. EDUARDA PENAIRA.

Mr. DAVIS.—From what you have seen and observed of this man from time to time—from day to day, and your knowledge of him, do you believe him to be sane or insane?

Mr. WARREN.—I object to that as not proper redirect examination, your Honor.

Mr. DAVIS.—I ask your Honor to ask the question, to allow me to ask the question unless you think it has already been answered.

The COURT.—I don't know but what a nonexpert

(Testimony of Eduarda Penaira.)

has a right to testify wherever he shows he has sufficient connection [179] with him and seen him often enough to have an opinion, or justified in forming an opinion, but this witness has been questioned fully in regard to that matter and stated there was nothing the matter with him physically or mentally.

Mr. DAVIS.—I will take your Honor's ruling, your Honor.

Mr. WARREN.—I would like to ask another question, if I may.

The COURT.—Yes.

Mr. WARREN.—I want to ask you, what relation are you to Anatalio?

A. He is a cousin of mine.

Mr. WARREN.—All right; that is all. [180]

**Testimony of Leonardo Pinara, for Libelant.**

Direct examination of LEONARDO PINARA, for libellant, sworn.

Mr. DAVIS.—(Through the Interpreter, Mr. A. F. OCAMPO.) Q. What is your name?

A. Leonardo Pinara.

Q. Where do you live? A. Here.

Q. You live in—did you come from Kauai this morning? A. Yes.

Q. From what plantation, Eleele? A. Eleele.

Q. Did you know Anatalio Peneyra?

A. Yes, sir.

Q. How long have you known him?

A. Ever since he was born.

Q. Know him for the last two years?

(Testimony of Leonardo Pinara.)

Mr. WARREN.—I object to that as superfluous.

The COURT.—Yes. Perhaps you mean has he been associated with him the last two years?

A. Yes.

Mr. DAVIS.—Did you visit him during the last two years? A. Yes.

Q. Did you see him pretty nearly every day, or how often? A. I saw him every day.

The COURT.—During the last two years?

A. Yes.

Mr. DAVIS.—Now, on the 17th, or the 19th, of December did he start to leave the Island of Kauai?

A. Yes.

Q. Do you remember the day he left? [181]

A. After we got our bonus.

Q. Yes, and did you see him on that day?

A. I did.

Q. Now, just tell the Court, without any assistance from me, what his mental and physical condition was on that day?

Mr. WARREN.—I object to that as incompetent, the witness not being qualified to answer a question like that.

Mr. DAVIS.—I submit it is perfectly competent, a nonexpert can answer his belief; he seen him every day and visited him.

The COURT.—I think it is admissible, overrule the objection.

Mr. DAVIS.—Just answer the question.

A. He is a good man.

Q. Was he all right mentally and physically?

(Testimony of Leonardo Pinara.)

Mr. WARREN. — The same objection, your Honor; I don't want to renew it all the time, but the same objection applies to all these questions.

Mr. DAVIS.—How was he mentally and physically?

The COURT.—All right, Mr. Warren.

A. He was in perfect mental condition.

Mr. DAVIS.—Now, did you ever see anything wrong with him during the two years you saw him working there? A. No.

Q. Did you see him after he was hurt?

A. I did not.

Q. Didn't see him after he was hurt, but on the day he started to go away you did see him?

A. I did.

Q. Where was he going, do you know?

A. I do. [182]

Q. Where was he going?

A. He was going back to the Philippines.

Q. Back to the Philippines; and were you working on the plantation with him, or what was you doing?

A. Working same plantation, but different Luna altogether.

Q. You were working on the same plantation as well as him, on the same plantation?

A. Yes, but different Luna.

Q. But you saw him every day pretty nearly?

A. Yes.

Q. Is this his little girl sitting here?

A. That is his daughter.

(Testimony of Leonardo Pinara.)

Q. Did you ever know him to be sick during the last two years up to the time he was hurt?

A. No.

Mr. DAVIS.—Take the witness.

Cross-examination of LEONARDO PINARA.

Mr. WARREN.—What relation are you to Anatalio Peneyra? A. He is my uncle.

Q. Did you come from the Philippines with him?

A. He came first, and I came afterwards.

Q. Ever since you came from the Philippines you have been on the same plantation? A. Yes, sir.

Q. How long ahead of you was it that he came to the plantation? [183]

A. One year ahead.

Q. When did you come?

A. I arrived in Kauai plantation on August 17th of last year.

Q. And he came one year before that? A. Yes.

Mr. WARREN.—That is all.

Mr. DAVIS.—On behalf of Judge Banks and myself, we wish to submit this case, and we are willing, if your Honor please, to submit it without argument. I am willing to submit it either with or without argument.

Mr. WARREN.—Before discussing that phase of it, your Honor, I would like to file duplicate of certificate of the Commissioners of Insanity, adjudging this man sane and discharged. I now offer certificate of sanity of the Commissioners of Insanity, dated May 3, 1918, adjudging this man, Anatalio

(Testimony of Leonardo Pinara.)

Peneyra, sane, and discharging him from the asylum.

Mr. DAVIS.—Yes, you are one of the commissioners, aren't you? We have no objection, your Honor. Is he out?

Mr. WARREN.—I don't know. But what was that remark, Mr. Davis?

Mr. DAVIS.—If he has a certificate of discharge, your Honor, he should be out of the institution.

Mr. WARREN.—The insinuation goes not to me, but to the commission on insanity, and I take exception to it on behalf of the Commissioners of Insanity of the Territory of Hawaii.

Mr. DAVIS.—If the man is discharged he should have left the institution.

The COURT.—I am not concerned with that.

Mr. DAVIS.—He is. [184]

Mr. WARREN.—I am concerned with the reflections cast upon the Commissioners.

Mr. DAVIS.—No reflections, but he ought to be out; I reiterate it.

Mr. WARREN.—Let me add, your Honor, that Doctor Schwallie, the Superintendent of the Insane Asylum, have told me that these people have been anxious to get hold of him, have been anxious to get word to him, anxious to know when he would get out and wanted the certificate as soon as possible, and I requested the other commissioners to get the certificate as soon as possible and the man has been ready for discharge from that moment, and if he has not

(Testimony of Leonardo Pinara.)

been released it is because they have not cared to go out and find out.

Mr. DAVIS.—It is rather strange, though, isn't it?

Mr. WARREN.—If your Honor has sufficient recollection of the testimony, very well, but I am perfectly willing, if your Honor desire it, to furnish a summary of the evidence.

The COURT.—I would rather the case be argued.

Mr. DAVIS.—When would your Honor like to have it?

The COURT.—Monday morning.

Mr. WARREN.—No brief.

Mr. DAVIS.—I waive my right to file a brief.

The COURT.—You can if you want to.

Mr. WARREN.—The rules call for one unless it is otherwise directed.

Mr. DAVIS.—I will waive my right if he waives his.

The COURT.—All right; ten o'clock Monday morning. [185]

Honolulu, H. T., July 1, 1918.

I hereby certify that the foregoing transcript of testimony consisting of one hundred and sixty-one (161) typewritten pages, is a full, true, and accurate transcript of my shorthand notes of the testimony taken and the proceedings had upon the trial of the case of Anatalio Peneyra, an Insane Person, by His Guardian, Adriana Borha, His Guardian Ad Litem, vs. The American Steamship "Kinau," Her En-

gines, etc., upon the days and at the times in said transcript mentioned.

H. F. NIETERT,
Official Reporter U. S. District Court. [186]

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*In the United States District Court for the Territory of Hawaii.*

**Testimony of Anatalio Peneyra, Taken Before Judge Vaughan, May 13, 1918.**

Testimony of ANATALIO PENEYRA taken before Judge VAUGHAN May 13th, 1918.

(Questioned by Judge VAUGHAN. Answered through interpreter.)

Q. What is your name? A. Anatalio Peneyra.
Q. Where were you born?
A. Occidental—in the Philippine Islands.
Q. How old are you?
A. Forty years old, this year, 1918.
Q. What day of the year?
A. This coming December I will be forty.
Q. What day in December?
A. The first day of next December.
Q. Were you born in the Philippines?
A. Yes.
Q. When did you come to Honolulu?
A. In 1916.
Q. As a plantation laborer? A. Yes.
Q. You lived on the Island of Kauai? A. Yes.
Q. You got tired and wanted to go home?

(Testimony of Anatalio Peneyra.)

A. Yes.

Q. You wanted to go back to the Philippines?

A. Yes. That was my intention if allowed to do so.

Q. After you started on your journey, what was the matter?

A. The owners of the ship send me to a certain place which I don't know the place and from there I come to Honolulu. I don't know the place.

Q. Were you sick at the time you started to leave to go on the [187] trip? A. No.

Q. Are you married? A. My wife is dead.

Q. When did your wife die?

A. My second wife died about seven years ago.

Q. Have you got a third one? A. No.

Q. Is the little girl your little girl? A. Yes.

Q. You were taking her home to the Philippines?

A. Yes.

Q. And you got on the boat to go? A. Yes.

Q. Did you have a ticket? A. Not yet.

Q. Did you have a ticket at the time you got on board? A. I wasn't given yet a ticket.

Q. Did you take your little girl on the boat with you? A. Yes.

Q. Did you walk up on the upper deck?

A. We did.

Q. Did you leave the little girl on the upper deck?

A. Yes.

Q. And you went down to see about your baggage?

A. Yes.

Q. That's what you went down for? A. Yes.

(Testimony of Anatalio Peneyra.)

Q. Did you remember when you fell on the steamer? A. I did.

Q. You remember falling? A. Yes.

Q. How came you to fall? A. I was dizzy.

Q. Were you facing towards the hatch when you fell? [188] A. Yes.

Q. You were facing the hatch? A. Yes.

Q. Did you fall forward through the hold or hatch? A. Yes.

Q. Because you were dizzy? A. Yes.

Q. Did you fall backwards through it? A. No.

Q. When you fell do you remember them picking you up? A. Yes.

Q. You remember them picking you up after you fell? A. I do.

Q. You remember them picking you up out of the hatch and taking you back on the shore?

A. Yes.

Q. You remember that? A. Yes.

Q. Did you know at that time they were taking you back to the shore? A. Yes.

Q. Did you have them take your little girl with you? A. Yes.

Q. Was the little girl taken back on shore?

A. Yes.

Q. How did you get back from the ship to the shore?

A. The boss of the steamer ordered me to go ashore.

Q. Are you crazy? A. No.

Q. Have you been crazy? A. No.

(Testimony of Anatalio Peneyra.)

Q. Did you know that you were out here at the asylum? A. Yes.

Q. What were you doing out at the asylum? [189]

A. I was out there simply sitting around.

Q. Did you know what you were doing there?

A. I was doing nothing. The American told me to go out to work but I worked only a month.

Q. When you fell on the ship were you squatting down or were you standing up?

A. At that time I was standing up—when I got dizzy I stooped down.

Q. Was the hatch open? A. Yes.

Q. Was there a rope around it? A. Yes.

Q. How many sides—was the rope around all four sides of the hatch?

A. Yes, the rope was around all four sides.

Q. When you fell in? A. Yes.

Witness dismissed.

Dated at Honolulu, T. H., May 13th, 1918. [190]

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In the United States District Court for the Territory of Hawaii. In Admiralty—In Rem. Natalio Peneyra, by Adriano Borha, His Guardian Ad Litem, Libellant, vs. The American Steamship "Kinau," etc., Libellee, and Inter-Island Steam Navigation Co., Ltd., Owner and Claimant of Said Steamship. George A. Davis, Proctor for Libellant. L. J. Warren, Proctor for Libellee. Horace W.

Vaughan, Judge. Dated Honolulu, T. H., May 20, 1918. Filed May 20, 1918. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [191]

*In the United States District Court for the Territory of Hawaii.*

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant,

vs.

The American Steamship "KINAU," etc.,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION CO., LTD., Owner and Claimant of Said Steamship.

**Opinion.**

May 13th, 1918, proctors for libellant presented the said Natalio Peneyra for examination by the Court touching his mental condition. The evidence had not been closed; but proctors for libellant requested the Court to examine him, claiming he was still insane, and the Court examined him through an interpreter, and the questions propounded by the Court and the answers of said Peneyra were taken down by a reporter.

The Court questioned said Peneyra about the circumstances and cause of his injuries for which this suit is brought. The statements made by him in re-

ply were in substance and effect as follows: that he was intending to return to the Philippine Islands and boarded the "Kinau" with his little girl to go to Honolulu for that purpose; that after he got on the ship he left his little girl on the upper deck and went below for the purpose of looking after his baggage; and that while he was standing near the hatch, which was open, looking into it, he became dizzy and started to squat down, and fell into it; that the rope was [192] around all four sides of the hatch at the time he fell into it; that he did not fall into it backwards; that his face was towards it when he fell and that he fell forward; that he remembered being picked up and taken ashore; that he is not insane and has not been. This statement of the said Natalio Peneyra refutes the claim that his fall and injuries were occasioned by negligence. Should this statement be considered or credited? His proctors insist that it should be disregarded. Evidence introduced on his behalf as well as evidence introduced by the libellee and claimant proves that the said Natalio Peneyra is now sane. The only evidence that he ever was insane is the adjudication upon which he was committed to the asylum. If he ever was insane he has recovered.

It is the opinion of the Court that the action should proceed in the name of the real party in interest, the said Natalio Peneyra; and it is also the opinion of the Court that the statements made by the said Natalio Peneyra should be considered as declarations against interest. It is also the opinion of the Court from all the evidence, that the injuries

of the said Natalio Peneyra were not caused by any negligence or failure of duty on the part of the steamship, its owners or officers, and that the said Natalio Peneyra is not entitled to recover any damages on account of said injuries.

(Sgd.) HORACE W. VAUGHAN,
Judge United States District Court.

Dated at Honolulu, T. H., May 20, 1918. [193]

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No. 172. In the District Court of the United States for the Territory of Hawaii. In Admiralty—In Rem. Natalio Peneyra, an Insane Person, by Adriano Borha, His Guardian Ad Litem, Libellant, vs. The American Steamship "Kinau," Her Engines, etc., Libellee, and Inter-Island Steam Navigation Company, Limited, Owner and Claimant. Decree. Smith, Warren & Whitney, 207 Bank of Hawaii Building, Honolulu, Hawaii, Proctors for Libellee and Claimant. Filed May 23, 1918, at 10 o'clock and 30 minutes A. M. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [194]

*In the District Court of the United States in and for the Territory of Hawaii.*

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,

Owner and Claimant.

**Decree.**

The above-entitled cause having heretofore come on regularly to be heard before the undersigned Judge of this court, Messrs. George A. Davis and J. J. Banks appearing as proctors for the libellant and L. J. Warren, Esq., of the firm of Smith, Warren & Whitney, appearing on behalf of the libellee and claimant; and the said cause having been tried and on the 13th day of May, 1918, submitted for decision; and the Court having rendered and filed its decision in said cause on the 20th day of May, 1918, holding that the injuries to the libellant were not caused by

any negligence or failure of duty on the part of the libellee, and that said libellant is not entitled to recover any damages on account thereof; [195]

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment in said cause be and the same is hereby entered therein in favor of the libellee and claimant and against said libellant; and that said action be and the same is hereby dismissed with costs taxed against the libellant in the sum of $99.55, of which sum $39.45 is hereby required to be paid by him to the clerk of this Court and the remaining sum of $60.10 paid to the proctors for the libellee and claimant as costs due said libellee and claimant.

And the Court being satisfied and having found that the said Natalio Peneyra (in the initial pleadings herein named as "Anatalio Pinira") was a sane person, on the 13th day of May, 1918, and now still is a sane person:

IT IS HEREBY FURTHER ORDERED AND DECREED that the above-named Adriano Borha, as guardian *ad litem* of the said Natalio Peneyra as libellant in this cause, be and he is hereby discharged as such guardian *ad litem;* and that any and all further proceedings which may be had or taken in said cause shall be had and taken by and in the name of said Natalio Peneyra.

Dated Honolulu, Hawaii, May 23d, 1918.

(Sgd.) HORACE W. VAUGHAN,
Judge of the United States District Court in and for the Territory of Hawaii. [196]

Filed May 23d, 1918, at 10 o'clock and 55 minutes A. M. (Sgd.) A. E. Harris, Clerk.

*In the District Court of the United States for the Territory of Hawaii.*

No. ——.

IN ADMIRALTY—IN REM.

NATALIO PENEYRA,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee and Claimant Thereof,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Owner Thereof.

**Notice of Appeal (Natalio Peneyra).**

To the Above-named Libellee and Inter-Island Steam Navigation Company, Limited, Bailee and Claimant Thereof, and the Inter-Island Steam Navigation Company, Limited, a Corporation, Owner Thereof, and Its Proctor:

You and each of you, and it, are hereby notified

that the above-named libellant intends to and does hereby appeal from the final decree of the United States District Court in and for the Territory of Hawaii entered in the above-entitled suit on the 23d day of May, A. D. 1918, to the United States Circuit Court of Appeals for the Ninth Circuit. [197]

Dated at Honolulu and Territory of Haawaii, this 23d day of May, A. D. 1918.

(Sgd.) NATALIO PENEYRA,
Libellant-Appellant.

(Sgd.) GEO. A. DAVIS,
(Sgd.) J. J. BANKS,
Proctors for the Libellant.

Received copy of the foregoing notice of appeal this 23 day of May, A. D. 1918.

(Sgd.) SMITH, WARREN & WHITNEY,
Proctors for Libellee-Appellee.

I hereby allow this appeal.
May 23d, 1918.

(Sgd.) HORACE W. VAUGHAN,
Judge U. S. District Court for Hawaii. [198]

Filed May 23, 1918, at 10 o'clock and 55 minutes A. M. (Sgd.) A. E. Harris, Clerk.

*In the District Court of the United States for the Territory of Hawaii.*

No. ——.

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee and Claimant Thereof,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Owner Thereof.

**Notice of Appeal (Natalio Peneyra, an Insane Person, etc.)**

To the Above-named Libellee and Inter-Island Steam Navigation Company, Limited, Bailee and Claimant Thereof, and the Inter-Island Steam Navigation Company, Limited, a Corporation, Owner Thereof, and Its Proctors:

You and each of you, and it, are hereby notified that the above-named libellant intends to and does hereby appeal from the final decree of the United States District Court in and for the Territory of Hawaii entered in the [199] above-entitled suit on the 23d day of May, A. D. 1918, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, District and Territory of Hawaii, this 23d day of May, A. D. 1918.

NATALIO PENEYRA,
By ADRIANO BORHA,
His Guardian ad Litem.

GEO. A. DAVIS,
J. J. BANKS,
Proctors for the Libellant.

Received a copy of the foregoing notice of appeal on this 23d day of May, A. D. 1918.

SMITH, WARREN & WHITNEY,
Proctors for Libellee, Claimant and Owner.

I hereby allow this appeal, upon petition of proctors for libellant.

(Sgd.) HORACE W. VAUGHAN,
Judge U. S. District Court for Hawaii. [200]

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Filed May 23, 1918, at 10 o'clock and 55 minutes A. M. (Sgd.) A. E. Harris, Clerk.

*In the District Court of the United States for the Territory of Hawaii.*

No. ——.

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,
Libellant-Appellant.

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,
Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee and Claimant Thereof,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Owner Thereof,
Appellees.

**Bond on Appeal of Natalio Peneyra, an Insane Person, etc.**

KNOW ALL MEN BY THESE PRESENTS: That we, Natalio Peneyra, an insane person, by Adriano Borha, his guardian *ad litem,* libellant-appellant in the above-entitled suit, as principal, and K. Hamamura and Frank Nichols, as sureties, are held and firmly bound unto Inter-Island Steam Navigation Company, Limited, a corporation, bailee

and claimant of the American steamship "Kinau," her engines, machinery, boilers, tackle, apparel, boats, furniture and appurtenances, and Inter-Island Steam Navigation Company, Limited, claimant and owner of said steamship, appellees, in the sum of Seven Hundred Fifty Dollars ($750.00) to be paid to the said [201] Inter-Island Steam Navigation Company, Limited, a corporation, bailee, claimant and owner of said steamship, appellee herein, its successors or assigns, to which payment well and truly to be made we bind ourselves and each of us, our and each of our respective heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated at the City and County of Honolulu, in the District and Territory of Hawaii, this 23d day of May, A. D. 1918.

WHEREAS, the above-named Natalio Peneyra, an insane person, by Adriano Borha, his guardian *ad litem,* the libellant-appellant in this suit, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree in this suit, made and entered up in favor of the libellee and appellee above named by the United States District Court for the Territory of Hawaii and duly filed in said Court on the 23d day of May, A. D. 1918, by the above-entitled Court, praying that said decree may be reversed.

NOW, THEREFORE, the condition of this obligation is such that if the above-named libellant-appellant aforesaid shall prosecute his appeal to effect and shall answer all costs to which the libellee-appellees may be entitled, if he fails to make good

his appeal, and if he shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in this cause, or on the mandate of the United States Circuit Court of Appeals for the Ninth Circuit by the United States District Court for the Territory of Hawaii, then this obligation shall be void; otherwise the same shall remain in full force and effect. [202]

IN WITNESS WHEREOF, the aforesaid principal and the aforesaid sureties have hereunto set their hand and seal at Honolulu, in the City and County of Honolulu, District and Territory of Hawaii, this 23d day of May, A. D. 1918.

NATALIO PENEYRA,
An Insane Person,
By (Sgd.) ADRIANO BORHA,
His Guardian Ad Litem.
(Sgd.) K. HAMAMURA,
(Sgd.) FRANK NICHOLS,
Sureties.

Signed and sealed in the presence of
(Sgd.) GEO. S. CURRY.

The foregoing bond is approved as to form, amount and sufficiency of sureties.

Dated at Honolulu, in the district and Territory of Hawaii, this 23 day of May, A. D. 1918.

(Sgd.) HORACE W. VAUGHAN,
Judge of the United States District Court for the District and Territory of Hawaii. [203]

**Notice of Filing of Bond on Behalf of Natalio Peneyra, an Insane Person, etc.**

To Inter-Island Steam Navigation Company, Limited, a Corporation, Bailee, Claimant and Owner of the American Steamship "Kinau," Her Engines, etc., Appellee in this Suit, and to Its Proctors and Attorneys, Messrs. Smith, Warren and Whitney.

You and each of you are hereby notified that the appellant in this suit, Natalio Peneyra, an insane person, by Adriano Borha, his guardian *ad litem,* has filed in the United States District Court for the Territory of Hawaii, a bond in the sum of Seven Hundred Fifty Dollars ($750.00) in accordance with the rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit, and the names and residences of the sureties who have executed said bond on appeal in this suit, a copy of which is attached hereto, and made a part hereof, are as follows: K. Hamamura resides and does business at Numbers 100 and 102 North Beretania Street, in said Honolulu, and his postoffice address is Post Office Box 825, Honolulu; and the said Frank Nichols resides and lives at Silent Hotel, so called, on Hotel Street, opposite Union Street, in said Honolulu, and they are the sureties on said bond filed in this court in this suit on appeal from the final decree made and entered herein in the United States District Court for the Territory of Hawaii, and from which final decree the said libellant has appealed and filed his notice of appeal.

Dated at Honolulu, this 23d day of May, A. D. 1918.

NATALIO PENEYRA,
An Insane Person,
By His Guardian Ad Litem,
ADRIANO BORHA,
By (Sgd.) GEO. A. DAVIS,
His Proctor. **[204]**

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Filed May 23, 1918, at 12 o'clock M. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

*In the District Court of the United States for the Territory of Hawaii.*

No. ——.

IN ADMIRALTY—IN REM.

NATALIO PENEYRA,
Libellant-Appellant.

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,
Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee and Claimant Thereof,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Owner Thereof,
Appellees.

**Bond on Appeal of Natalio Peneyra.**

KNOW ALL MEN BY THESE PRESENTS: That we, Natalio Peneyra, libellant-appellant in the above-entitled suit, as principal, and K. Hamamura and Frank Nichols, as sureties, are held and firmly bound unto the Inter-Island Steam Navigation Company, Limited, a corporation, bailee and claimant of the American steamship "Kinau," her engines, machinery, boilers, tackle, apparel, boats, furniture and appurtenances, and the Inter-Island Steam Navigation Company, Limited, claimant and owner of said steamship, appellees, in the sum of Seven Hundred Fifty Dollars ($750) to be paid to the said Inter-Island Steam Navigation Company, Limited, a corporation, bailee, claimant and owner of said steamship, appellee herein, its successors [205] and assigns, to which payment well and truly to be made we bind ourselves and each of us, our and each of our respective heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated in the City and County of Honolulu, in the District and Territory of Hawaii, this 23d day of May, A. D. 1918.

WHEREAS, the above-named Natalio Peneyra, the libellant-appellant in this suit, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree in this suit, made and entered up in favor of the libellee and appellee above-named by the United States District Court for the Territory of Hawaii and duly filed in said court on the 23d day of May, A. D. 1918, by the

above-named court, praying that said decree may be reversed.

NOW, THEREFORE, the condition of this obligation is such that if the above-named libellant-appellant aforesaid shall prosecute his appeal to effect and shall answer all costs to which the libellee-appellees may be entitled, if he fails to make good his appeal, and if he shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in this cause or on the mandate of the United States Circuit of Appeals for the Ninth Circuit by the United States District Court for the Territory of Hawaii, then this obligation shall be void; otherwise the same shall remain in full force and effect.

**[206]**

IN WITNESS WHEREOF, the aforesaid principal and the aforesaid sureties have hereunto set their hand and seals at Honolulu, in the City and County of Honolulu, District and Territory of Hawaii, this 23d day of May, A. D. 1918.

(Sgd.) NATALIO PENEYRA,
Principal.

(Sgd.) K. HAMAMURA,
(Sgd.) FRANK NICHOLS,
Sureties.

Signed and sealed in the presence of,
(Sgd.) GEO. S. CURRY.

The foregoing bond is approved as to form, amount and sufficiency of sureties.

Dated Honolulu, in the District and Territory of

Hawaii, this 23d day of May, A. D. 1918.

(Sgd.) HORACE W. VAUGHAN,
Judge of the United States District Court for the District and Territory of Hawaii. [207]

**Notice of Filing of Bond on Appeal of Natalio Peneyra.**

To Inter-Island Steam Navigation Company, Limited, a Corporation, Bailee, Claimant and Owner of the American Steamship "Kinau," Her Engines, etc., Appellee, and to Messrs Smith, Warren and Whitney, Its Attorneys and Proctors.

You and each of you are hereby notified that the appellant in this suit, Natalio Peneyra, has filed in the United States District Court for the Territory of Hawaii, a bond in the sum of Seven Hundred Fifty Dollars ($750.00), in accordance with the rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit, and the names and residences of the sureties who have executed said bond on appeal in this suit, a copy of which is attached hereto, and made a part hereof, are as follows: K. Hamamura resides and does business at Numbers 100 and 102 North Beretania Street, in said Honolulu, and his postoffice address is Post Office Box 825; and the said Frank Nichols resides and lives at Silent Hotel, so called, on Hotel Street, opposite Union Street, in said Honolulu, and they are the sureties on said bond filed in this court in this suit on appeal from the final decree made and entered herein in the United States District Court

for the Territory of Hawaii, and from which final decree the said libellant has appealed and filed his notice of appeal.

Dated, Honolulu, T. H., this 25 day of May, A. D. 1918.

NATALIO PENEYRA,

(Sgd.) By GEO. A. DAVIS,

His Proctor. [208]

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In the United States District Court for the Territory of Hawaii. In Admiralty—In Rem. Anatalio Pinira, an Insane Person, by Adriano Borha, His Guardian, Ad Litem, Libellant, vs. The American Steamship "Kinau," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, Libellee. Order Allowing Appeal. Filed May 24, 1918. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [209]

*In the United States District Court for the Territory of Hawaii.*

IN ADMIRALTY—IN REM.

ANATALIO PINIRA, an Insane Person, by ADRIANO BORHA, His Guardian, Ad Litem,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee.

**Order Allowing Appeal.**

Whereas, on the 11th day of March, 1918, a libel was filed instituting this suit in the name of Anatalio Pinira, as an insane person, by Adriano Borha, as his guardian *ad litem,* as libellant against the American steamship "Kinau," her engines, machinery, boilers, tackle, apparel, boats, furniture and appurtenances, as libellee, and whereas, thereafter by amendment the title to the suit was corrected and stated as, Natalio Peneyra, an insane person, by Adriano Borha, his guardian *ad litem,* etc., and whereas, the Inter-Island Steam Navigation Company, Ltd., appeared and filed claim, and whereas, the said suit thereafter proceeded in the name and style of Natalio Peneyra, an insane person, by Adriana Borha, his guardian *ad litem,* etc., until the 13th day of May, 1918, and whereas, on the said 13th day of May, the Court after hearing evidence found that the said Natalio Peneyra was then sane and ordered that further proceedings in this suit be had in the name of the said Natalio Peneyra, and whereas, in the final decree it was ordered and decreed that said guardian *ad litem* be discharged and that all further proceedings should be had and taken in the name of the said Natalio Peneyra, and whereas, the said Natalio Peneyra has duly filed notice of appeal from said [210] final decree by himself and also by said guardian *ad litem,* and whereas, the said Natalio Peneyra desires to appeal from the said decree both in his own name and in the name of his guardian *ad litem* and in his own person and by his guardian *ad*

*litem,* and whereas, the said bonds hereinafter referred to have already been filed and approved by the Court, and whereas, the said Natalio Peneyra has filed assignments of error both in his own name and in the name of his guardian *ad litem,*—

NOW, THEREFORE, it is hereby ordered that said appeals be and the same are hereby allowed as prayed for, and it is hereby further ordered that libellant may give one joint and several bond on appeal in the aggregate sum of $750 to cover costs of the appeal by himself in his own person, and in accordance with his request may give one joint and several bond on appeal in the aggregate sum of $750 to cover costs on appeal by the said guardian *ad litem,* the said bonds to be in form and conditioned as required by law and by the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and it is further ordered that pending such appeals all further proceedings in the case be stayed.

(Sgd.) HORACE W. VAUGHAN,
Judge United States District Court.

Dated at Honolulu, T. H., May 24th, 1918. [211]

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Filed May 23, 1918, 4 o'clock and X minutes P. M. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk.

*In the District Court of the United States for the Territory of Hawaii.*

No. ——.

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant-Appellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee and Claimant Thereof,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Owner Thereof,

Appellees.

NATALIO PENEYRA,

Libellant-Appellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee and Claimant Thereof,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Owner Thereof,

Appellees.

**Assignment of Errors.**

Now comes the above-named libellant, Natalio Peneyra, an insane person, by Adriano Borha, his guardian *ad litem,* and Natalio Peneyra, libellant-appellant in the above-entitled causes, and consolidated by an order duly made and entered up in the United States District Court, and say: [212]

That in the record and proceedings in the above-entitled cause there is manifest error, and said libellants-appellants now make, file and present the following assignment of errors upon which they will rely, as follows, to wit:

(1) The Court erred in dismissing the libel in this suit, and in taxing costs against the libellant, Natalio Peneyra, in the sum of ninety-nine and 55/100 dollars ($99.55), because said suit was commenced and continued down to final decree by Natalio Peneyra, an insane person, by his guardian *ad litem* Adriano Borha, under an order made and entered up in said cause by the Honorable J. B. Poindexter, one of the judges of this court, which order was never set aside; and said suit was commenced

and prosecuted by the said Adriano Borha as such guardian *ad litem,* in *forma pauperis* under said order of said judge.

(2) The Court erred in overruling and denying the motion made by the libellant-appellant Natalio Peneyra, an insane person, by Adriano Borha, his guardian *ad litem*, libellant-appellant, to set aside the oral decision rendered in that suit and to strike from the record the statement of Natalio Peneyra made to the presiding Judge on said hearing, Honorable Horace W. Vaughan.

(3) The Court erred in finding that upon the evidence, facts and circumstances appearing on the hearing of said cause, that the injuries to the libellant-appellant were not caused by any negligence, or failure of duty on the part of the libellee-appellee, and that the libellant-appellant was not entitled to recover any damages by reason thereof.

(4) The Court erred in finding for the libellee and against the libellant. [213]

(5) The Court erred in finding and holding that the libellee and the claimant and owner of the steamship "Kinau" did not violate the marine contract entered into between the libellant and the master and agent of said steamship, as set out in the libel filed in this suit, and that libellant was not entitled to recover any damages for the breach or breaches of said marine contract entered into between the libellant and the master and agents of said steamship.

(6) The Court erred in finding and holding under the evidence adduced on the hearing in this suit that the marine contract entered into between the libel-

lant and the master, agent and owner of said steamship "Kinau" had not been violated, as alleged and set out in the libel filed in this suit; and that the evidence and the preponderance of evidence in this suit did not establish that there was a violation of said marine contract on the part of the master, agent and owner of said steamship, nor of any obligation, or duty arising therefrom, and that the libellant-appellant was not entitled to recover any damages by reason or on account thereof.

(7) The Court erred in denying the libellant's motion to set aside the oral decision rendered in this suit and to strike from the record the statement of Natalio Peneyra, and for further relief in admiralty upon the grounds and for the reasons relied upon in support of said motion.

(8) The Court erred in receiving the statement of Natalio Peneyra two days after he had been discharged from the insane asylum as to how and under what circumstances he sustained the injuries on board the steamship "Kinau," where he was received as a passenger in the quarters set aside for second-class passengers on the 19th day of December, A. D. 1917; that the said Natalio Peneyra was not a competent witness under the circumstances disclosed in this case, and said statement, [214] even if made under oath, was not evidence in the case, and could not be relied upon.

(9) The Court erred in finding and holding that there was evidence of contributory negligence on the part of the libellant-appellant, which said defense was not set up in the answer of the said owner and

claimant, and the evidence does not sustain the finding that there was contributory negligence on the part of the libellant-appellant Natalio Peneyra.

(10) The Court erred in finding that upon the facts appearing on the trial of said cause no damage had resulted to the libellant.

(11) The Court erred in finding for the libellee, claimant and owner and against the appellant.

(12) The Court erred in entering a final decree in favor of the libellee, owner and claimant, and against the libellant in this suit.

(13) The Court erred in making, rendering and entering the final decree in said suit upon the findings and records therein.

(14) The Court erred in rendering and making its decree in said suit because said decree was and is contrary to admiralty and justice, and to the evidence and the preponderance of evidence, and the facts and circumstances as stated and shown in the pleadings and records in said suit.

In order that the foregoing assignment of errors may be and appear of record, the said libellant-appellant files and presents the same to said court, and prays that such disposition on behalf thereof may be made as in accordance with law and the Statutes in the United States in such case made and provided. [215]

And said libellants-appellants pray for a reversal of the said final decree heretofore made and entered by said Court.

Dated at Honolulu, District of Hawaii, this 23d day of May, A. D. 1918.

NATALIO PENEYRA,
An Insane Person,
By ADRIANO BORHA,
His Guardian *ad Litem,*
Libellant-Appellant, and
NATALIO PENEYRA,
Libellant-Appellant,
By GEORGE A. DAVIS,
J. J. BANKS,
His Proctors.

Service of accounting of the foregoing assignment of errors acknowledged on this 23 day of May, A. D. 1918.

_____,
Counsel for Appellees. [216]

City and County of Honolulu,
District and Territory of Hawaii.

Ebert J. Botts, of Honolulu, attorney at law, being first duly sworn, upon his oath deposes and says: That he is a citizen of the United States and is over the age of twenty-one years; and that on the 23d day of May, A. D. 1918, he did personally serve upon William L. Warren, Esq., at his office in the Bank of Hawaii Building, in said Honolulu, a full, true and correct copy of the foregoing assignment of errors, and the said William L. Warren is one of the attorneys and proctors of record for the libellee-appellees herein, and the said William L. Warren personally received said copy of said assignment of errors.

E. J. BOTTS.

Subscribed and sworn to before me this 23 day of May, A. D. 1918.

[Seal] GEO. S. CURRY,
Notary Public, First Judicial Circuit, Territory of Hawaii. [217]

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Filed May 24, 1918. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk.

*In the District Court of the United States, for the Territory of Hawaii.*

No. ——

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant–Appellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Bailee, Claimant and Owner of said Steamship,

Appellee,

And Under the Final Decree Filed Herein,

NATALIO PENEYRA,

Libellant and Appellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Bailee, Claimant and Owner of said Steamship,

Appellee.

**Assignment of Errors of Natalio Peneyra, an Insane Person, by Adriano Borha, His Guardian Ad Litem.**

SUIT FOR DAMAGES BY PASSENGER FOR BREACH OF MARINE CONTRACT BY CARRIER.

Now comes the above-named Natalio Peneyra, an insane person, by Adriano Borha, his guardian *ad litem,* libellant-appellant herein, and says that in the record and proceedings in the above-entitled cause there is manifest error and said libellant-appellant who has been allowed an appeal from the decree filed herein by the said Court now makes, files and presents his separate assignment of errors as follows, and upon which he will rely, to wit: [218]

1. The Court erred in finding and holding that Natalio Peneyra, who had been adjudicated an insane person and had been committed to an Insane

Asylum but was discharged therefrom on the 11th day of May, A. D. 1918, and who appeared in court on May the 13th, A. D. 1918, had recovered and was sane upon the statement made by the said Natalio Peneyra in answer to questions put by the presiding Judge of said Court, and in which statement the said Natalio Peneyra denied that he was insane at any time, and that he was not unconscious after sustaining the injuries on board the steamship "Kinau" on the 19th of December, A. D. 1917, when all the evidence in the case as to the condition of the said Natalio Peneyra established that he was insane, had been adjudicated an insane person by a court of competent jurisdiction, had been committed to an insane asylum, which said order of adjudication was then in full force and unrevoked and the said Adriano Borha had been duly appointed his guardian by a court of competent jurisdiction as well as guardian *ad litem* in this suit, and the order appointing Adriano Borha guardian *ad litem* was made by the Honorable J. B. Poindexter, one of the Judges of the United States District Court, and no motion had been made to set it aside, and no medical examination was made upon order of the Court on the 13th of May, A. D. 1918, before finding that the said Natalio Peneyra had fully recovered his reason and was sane, and fully competent to be substituted as plaintiff in this suit in the room and place of the said guardian *ad litem,* Adriano Borha.

2. That the Court erred in finding that the said Natalio Peneyra was sane and in so declaring him sane and in ordering and directing that the said

Adriano Borha, the guardian *ad litem,* duly appointed in this suit, should be discharged as such guardian *ad litem* and the said Natalio Peneyra should be made libellant in this suit. [219]

3. The Court erred in overruling and denying the motion to set aside the oral decision rendered in this suit and to strike from the record the statement of Natalio Peneyra, and for such other and further relief in admiralty as should be granted in accordance with the pleadings filed and the proofs on the hearing made and files by Natalio Peneyra by Adriano Borha, his guardian *ad litem,* on the 20th day of May, A. D. 1918.

4. The Court erred in holding that upon the facts appearing upon the hearing of this cause the Marine Contract entered into between the libellant and the libellee on or about the 19th day of December, A. D. 1918, as set out in the libel filed herein, was not violated by the libellee or the owners of said steamship "Kinau" or its servants or agents, and that the libellant was not entitled to recover any damage for the injury sustained by the said Natalio Peneyra.

5. The Court erred in finding and holding that the claimant and owner of said steamship was not guilty of any negligence or failure of duty toward the said Natalio Peneyra who was received on board of said steamship in the steerage quarters notwithstanding that he had a first-class ticket entitling him to a first-class passage from Nawiliwili to Honolulu, and in finding and holding that the marine contract entered into between Natalio Peneyra and the owner of said steamship had not been violated and the

duties and obligations arising from said marine contract had not been broken, and that the said libellant was not entitled to any damages for the injury sustained on board of said steamship.

6. The Court erred in holding and finding that it was through no fault or negligence of the servants or agents of the steamship [220] "Kinau," or the servants or agents of the owners of said steamship, that the libellant sustained the injuries set out in the libel filed in this suit and was not entitled to any damages for said injury so sustained by the said Natalio Peneyra on the 19th of December, 1918, on board said steamship "Kinau."

7. The Court erred in finding that upon the facts appearing on the hearing of said cause no damage had resulted to the libellant.

8. The Court erred in finding for the libellee, claimant and owner of said steamship and against the libellant.

9. The Court erred in dismissing the libel in this suit and in taxing costs in the sum of $99.55 against the libellant.

10. The Court erred in finding and holding in favor of the libellee and claimant and against the libellant under the evidence adduced on the trial of this suit, the preponderance of the evidence and the great weight of the evidence adduced establishing that the marine contract entered into between the libellant and the owners of said steamship "Kinau" to receive the libellant on board the said steamship safely and without injury was violated and there was a breach and breaches of said contract by the

owners of said steamship, their servants and agents as well as a failure of duty entitling the libellant to recover substantial damages therefor.

11. The Court erred in giving weight to the statement of Natalio Peneyra made in court after the case had been closed and disregarding all the other evidence in the case and finding in favor of the libellee, claimant and owner of said steamship "Kinau," and in dismissing the libel filed in this suit.

12. The Court erred in entering a final decree in favor of the libellee, claimant and owner in this suit.

13. The Court erred in making, rendering and entering the final decree in this suit upon the findings and records therein. [221]

14. The Court erred in rendering and making its decree in said suit because said decree was and is contrary to law and admiralty and to the facts as disclosed by the evidence adduced on the hearing and shown in the pleadings and records in said suit.

In order that the foregoing assignment of errors may be and appear of record, the said libellant appellant files and presents the same to said Court and prays that such disposition on behalf thereof may be made as in accordance with law and the statutes of the United States in such case made and provided, and said libellant-appellant Natalio Peneyra, an insane person, by his guardian *ad litem,* Adriano Borha, prays a reversal of the said final decree heretofore made and entered by said Court.

Dated at Honolulu, District of Hawaii, the 24th day of May, A. D. 1918.

NATALIO PENEYRA,
An Insane Person,
By ANDRIANO BORHA,
His Guardian *ad Litem,*
By GEO. A. DAVIS,
J. J. BANKS,
His Proctors. [222]

City and County of Honolulu,
District and Territory of Hawaii,—ss.

Ebert J. Botts, being first duly sworn, deposes and says: That he is an attorney at law and a resident of the city and county of Honolulu, Territory of Hawaii; that on the 25th day of May, A. D. 1918, he did serve William L. Warren, one of the proctors and attorneys of the libellee-appellee herein, with a true and correct copy of the assignment of errors herein, by leaving with the said William L. Warren personally a true and correct copy thereof, at his office in said Honolulu, and the said William L. Warren personally received said copy.

E. J. BOTTS.

Subscribed and sworn to before me this 25 day of May, A. D. 1918.

[Seal] GEO. S. CURRY,
Notary Public, First Judicial Circuit, Territory of Hawaii. [222 (a)]

Filed May 24, 1918. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk.

*In the District Court of the United States, for the Territory of Hawaii.*

No. ——

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant-Appellant.

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Bailee, Claimant and Owner of Said Steamship,

Appellee,

And Under the Final Decree Filed Herein,

NATALIO PENEYRA,

Libellant and Appellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Bailee, Claimant and Owner of Said Steamship,

Appellee.

**Assignment of Errors of Natalio Peneyra.**

SUIT FOR DAMAGES BY PASSENGER FOR BREACH OF MARINE CONTRACT BY CARRIER.

Now comes the above-named Natalio Peneyra, who was made libellant in this suit in his own person by decree of the United States District Court made and filed on the 23d day of May, A. D. 1918, and who has been allowed to appeal from said decree by the said Court, and as appellant herein under said order of said Court, now makes, files and presents his separate assignment of errors [223] as follows, and upon which he will rely, to wit:

1. The Court erred in dismissing the libel filed in this suit.

2. The Court erred in finding and holding that under the evidence adduced on the hearing in this suit commenced by his guardian *ad litem,* that there was no breach of the marine contract entered into between the said Natalio Peneyra and the owners of said steamship "Kinau" on the 19th of December, A. D. 1917, nor any violation of duty by the servants or agents of the claimant and owner of said steamship in receiving this appellant on board said steamship as alleged in the libel filed herein, and in finding and holding that said appellant was not entitled

to recover any damages for the injury sustained by him as set out in the libel filed herein.

3. The Court erred in finding that upon the evidence adduced on the trial of said cause no damage had resulted to this libellant and appellant.

4. The Court erred in finding for the libellee, claimant and owner and against the libellant appellant, Natalio Peneyra.

5. The Court erred in finding and holding that there was no negligence or failure of duty on the part of the claimant and owner of said steamship "Kinau" or of any of its servants or agents which entitled this libellant and appellant to recover damages.

6. The Court erred in finding and holding that the injury sustained by this libellant and appellant was by and through the contributory negligence of this libellant and appellant, and that he was not entitled to recover for the injury sustained by him on board the said Steamship "Kinau" on the 19th of December, A. D. 1917.

7. The Court erred in finding and holding that the injuries sustained by this libellant and appellant was by and through the contributory [224] negligence of the said Natalio Peneyra, this libellant and appellant, and especially when the defense of contributory negligence was not set up in the answer of the owner and claimant of said steamship nor relied on as a defense in this suit by said owner and claimant, and because there was and is no evidence of contributory negligence on the part of the said Natalio Peneyra, this libellant-appellant, which would bar

his recovery of damages in this suit.

8. The Court erred in finding and holding under the evidence adduced in this suit that the said libellant-appellant was not entitled to recover any damages for the injuries sustained by him and as set out in the libel filed herein, because there was no failure of duty or negligence on the part of the claimant and owner of said steamship "Kinau," or its servants or agents, and in dismissing the libel filed herein.

9. The Court erred in entering a final decree against the libellant-appellant and in favor of the libellee, claimant and owner of said steamship "Kinau" in this suit.

10. The Court erred in finding and holding in favor of the libellee and against the libellant-appellant, because said holding and finding was and is contrary to the evidence, the weight of the evidence and because all the material allegations of the libel were fully proven and no reason or facts are shown by the evidence to warrant such finding.

11. The Court erred in making, rendering and entering the final decree in said suit upon the findings and records therein.

12. The Court erred in rendering and making its decree in said suit because said decree was and is contrary to all the [225] evidence adduced in this suit, the preponderance of the evidence and the weight of the evidence and is contrary to law, admiralty and justice, and to the facts and circumstances as stated and shown in the pleadings and records in said suit.

In order that the foregoing assignment of errors

may be and appear of record, the said libellant-appellant files and presents the same to the said Court and prays that such disposition on behalf thereof may be made as in accordance with law and the statutes of the United States in such case made and provided, and said libellant-appellant Natalio Peneyra prays a reversal of the said final decree heretofore made and entered by said Court.

Dated at Honolulu, District of Hawaii, this 24th day of May, A. D. 1918.

NATALIO PENEYRA,
By GEO. A. DAVIS,
J. J. BANKS,
His Proctors. [226]

City and County of Honolulu,
District and Territory of Hawaii,—ss.

Ebert J. Botts, being first duly sworn, deposes and says: That he is an attorney at law and a resident of Honolulu, city and county of Honolulu, Territory of Hawaii; that on the 25th day of May, A. D. 1918, he did serve William L. Warren, one of the proctors and attorneys of the libellee-appellee herein, with a true and correct copy of the assignment of errors herein, by leaving with the said William L. Warren personally a true and correct copy thereof, at his office in said Honolulu, and the said William L. Warren personally received said copy.

E. J. BOTTS.

Subscribed and sworn to before me this 25 day of May, A. D. 1918.

[Seal] GEO. S. CURRY,
Notary Public, First Judicial Circuit, Territory of Hawaii. [227]

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Filed May 24, 1918. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

*In the District Court of the United States, for the Territory of Hawaii.*

No. 172.

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant-Appellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Owner Thereof,

Appellees.

**Citation on Appeal.**

SUIT FOR DAMAGES BY PASSENGER FOR BREACH OF MARINE CONTRACT BY CARRIER.

United States of America,
District of Hawaii,—ss.

The President of the United States, to the American Steamship "Kinau," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture, and Appurtenances, and to Inter-Island Steam Navigation Company, Limited, Bailee, Claimant and Owner Thereof, and Inter-Island Steam Navigation Company, Limited, Owner Thereof, and to Messrs. Smith, Warren & Whitney, Its Proctors, GREETING.

You, it and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco in the State of California, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the office of the [228] United States District Court for the Territory of Hawaii, in the above-entitled proceeding, wherein Natalio Peneyra, an insane person, by Adriano Borha, his guardian *ad litem,* is libellant-appellant, and under the decree filed herein Natalio Peneyra is libellant-appellant, and you, the respective libellee-appellees, do then and there show cause, if any there be, why the decree entered in the above-entitled proceeding on the 23d day of May, A. D. 1918, in said appeal mentioned and thereby appealed from

should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States of America, this 24th day of May, A. D. 1918.

[Seal] (Sgd.) HORACE W. VAUGHAN,
Judge of the United States District Court for the Territory of Hawaii. [229]

District of Hawaii,
Territory of Hawaii,
City and County of Honolulu,—ss.

George A. Davis, of Honolulu, in the District and Territory of Hawaii, attorney at law, upon being duly sworn, upon his oath deposes and says: That he is one of the proctors for the libellant in the within entitled cause, and that on Friday, the 24th day of May, A. D. 1918, he did personally serve M. M. Graham, the secretary and an officer of the Inter-Island Steam Navigation Company, Limited, owner and claimant of the American Steamship "Kinau," and the appellee in said suit with the annexed citation, and the order allowing the appeal of said cause by delivering to him, the said M. M. Graham, as such secretary and officer of said corporation, and at the office of said corporation, a full, true and correct copy of the said citation issued in the said suit, and a full, true and correct copy of the order allowing said appeal, to the United States Circuit Court of Appeals of the Ninth Circuit, and at the time of said service I exhibited to him, the said M. M. Graham, the said

secretary and officer of said corporation, the original citation issued on appeal in this suit, and further this deponent saith not.

(Sgd.) GEO. A. DAVIS.

Subscribed and sworn to at said Honolulu on this 24th day of May, A. D. 1918.

[Seal] (Sgd.) E. J. BOTTS,

Notary Public, First Judicial Circuit, Territory of Hawaii. [230]

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Filed July 20, 1918. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

*In the District Court of the United States, for the Territory of Hawaii.*

No. 172.

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant-Appellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Owner Thereof,

Appellee.

**Stipulation Re Transcript of Testimony.**

IT IS HEREBY STIPULATED: That inasmuch as no copy was made of the transcript of testimony in this cause, the original of said transcript of testimony may be included and made a part of the record on appeal in this cause and forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Judicial Circuit, and that said original transcript of testimony be returned to the office of the clerk of the United States District Court for the District and Territory of Hawaii after the record on appeal herein shall have been officially filed with the clerk of the Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at Honolulu, Hawaii, July 25, 1918.

(Sgd.) GEO. A. DAVIS,
Proctor for Libellant-Appellant.

Stipulation approved.

(Sgd.) HORACE W. VAUGHAN,
Judge.

(Sgd.) SMITH, WARREN & WHITNEY,
Proctors for the Appellee. [231]

*In the District Court of the United States, for the Territory of Hawaii.*

No. 172.

IN ADMIRALTY—IN REM.

NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Libellant-Appellant,

vs.

The American Steamship "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances,

Libellee,

and

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Corporation, Owner Thereof,

Appellees.

**Praecipe for Transcript.**

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Libellant's Libel.
   1. (a) Statement Under Admiralty Rule 4.
2. Answer of Claimant.

2. (a) Certificate to Statement Under Admiralty Rule 4.
3. Libellant's Exhibit "A."
4. Libellee's Exhibit "1."
5. Testimony of Anatalio Peneyra.
6. Opinion of Court.
7. Decree.
8. Notice of Appeal.
9. Notice of Appeal.
10. Bond on Appeal.
11. Bond on Appeal.
    11. (a) Orders Extending Time to Transmit Record on Appeal. [232]
12. Order Allowing Appeal.
13. Assignment of Errors.
14. Assignment of Errors.
    14. (a) Assignment of Errors.
15. Citation on Appeal.
16. Transcript of Testimony.
    16. (a) Certificate of Clerk to Transcript of Record.
17. This Praecipe.
    17. (a) Stipulation.

Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the clerk of said Circuit Court of Appeals at San Francisco, before the 24th day of June, A. D. 1918.

(Sgd.) GEO. A. DAVIS. [233]

*In the United States District Court, in and for the District and Territory of Hawaii.*

No. 172.

NATALIO PENEYRA, etc.,

Libellant,

vs.

The American Steamship "KINAU," Her Engines, etc.,

Libellee.

**Certificate of Clerk U. S. District Court to Apostles on Appeal.**

I, A. E. Harris, Clerk of the United States District Court for the District and Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 234, inclusive, is a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, asked for in the praecipe for transcript by the libellant, as the same remains of record and on file in my office, and I do further certify that I hereto annex the original assignment of errors and two orders extending time to transmit record on appeal.

I further certify that the cost of the foregoing transcript of record is $17.10 and that said amount has been paid to me by the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this court, this 25th day of July, A. D. 1918.

A. E. HARRIS,
Clerk U. S. District Court, Territory of Hawaii.

[Endorsed]: No. 3194. United States Circuit Court of Appeals for the Ninth Circuit. Natalio Peneyra and Natalio Peneyra, an Insane Person, by Adriano Borha, His Guardian Ad Litem, Appellant, vs. The American Steamship "Kinau," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and Inter-Island Steam Navigation Company, Limited, Bailee, Claimant and Owner Thereof, Appellees. Apostles on Appeal. Upon Appeals from the United States District Court for the Territory of Hawaii.

Filed August 6, 1918.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3194

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

NATALIO PENEYRA and NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

*Appellant,*

vs.

THE AMERICAN STEAMSHIP "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee, Claimant and Owner Thereof,

*Appellees.*

# BRIEF FOR APPELLANT

*Upon Appeal from the District Court of the United States for the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit.*



GEORGE A. DAVIS,
204 Bank of Hawaii Building,
Honolulu, Hawaii,
Attorney for Appellant

No. 3194

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

NATALIO PENEYRA and NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

*Appellant,*

vs.

THE AMERICAN STEAMSHIP "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee, Claimant and Owner Thereof,

*Appellees.*

*On Appeal from the District Court of Hawaii.*

# BRIEF FOR APPELLANT

## STATEMENT OF THE CASE.

This case comes before this honorable Court on appeal from that certain final decree rendered against the appellant in the above entitled suit by the District Court of the United States for the District and Territory of Hawaii, the Honorable Horace W. Vaughan, United States District Judge, presiding on the hearing and who signed the decree on the 23rd day of May, A. D. 1918. This suit was brought by Natalio Peneyra, an insane person, by Adriano Borha, his guardian ad litem, against the American steamship "Kinau," her engines, etcetra, to recover damages for the

several breaches of the marine contract to land on board said steamship "Kinau" this libellant, Natalio Peneyra and to carry and convey the said libellant safely and without injury from the port of Nawiliwili, on the Island of Kauai, to the port of Honolulu, on the Island of Oahu, as a first-class passenger. The libel, in substance, alleges that the libellant on or about the 19th day of December, A. D. 1917, applied to the duly authorized agent of the owners of the steamship "Kinau" for a first-class ticket as a passenger from the port of Nawiliwili, Kauai to the port of Honolulu, Oahu; and that he obtained said ticket from the said duly authorized agent of the owners of said steamship, and that the steamship "Kinau" was then lying at anchor in the harbor of Nawiliwili and was being run and operated as a passenger steamship between the port of Nawiliwili and the port of Honolulu aforesaid, and that after purchasing said first-class ticket and receiving the same, the libellant was taken in a small boat from the shore at Nawiliwili, run and operated by the owners of said steamship, and was taken out to said steamship "Kinau" then lying at anchor in the said harbor of Nawiliwili and was conducted on board of said steamship into the steerage quarters of said steamship instead of on to the deck of said steamship where the libellant was entitled under his ticket to be conducted. The libel further alleges that the hatch on the second deck of said vessel, to-wit: the steerage quarters was left open and unguarded and insufficiently lighted by the master and officers of the said steamship, and that the second officer of the said steamship ordered the libellant to remain in the steerage quarters of the said steamship, and that said libellant, without any fault on his part, suddenly stepped into a large and dangerous space from which the hatch had been re-

moved and left unguarded and unlighted, and that libellant fell down into the hold of said steamship, a distance of about fifteen feet and sustained severe and serious injuries to his head and other parts of his body, and that from said injuries occasioned by the negligence of the master and officers of said steamship, the libellant lost his reason and became insane and was sick and ill and suffered and underwent great pain of body and mind, and that after said libellant had sustained the injuries, he was taken up from the hold of said steamship and taken from and off of said steamship "Kinau" on shore at the port of Nawiliwili and placed in a hospital, and that subsequently, to-wit: on or about the 5th of January, 1918, under a committment, the libellant was incarcerated in the Insane Asylum at Honolulu, where he remained for a period of four months, and was then discharged. It also appears that Adriano Borha, on the 29th of January, 1918, was duly appointed the guardian of this libellant by the Judge of the Circuit Court of the Fifth Judicial Circuit of the Territory of Hawaii, and that the said Adriano Borha upon the 16th day of March, A. D. 1918, was duly appointed as the guardian *ad litem* of the libellant in this suit by the Honorable Joseph B. Poindexter, Judge of the United States District Court for the Territory of Hawaii, and the libel was filed under an order of said judge and process in rem was issued against said steamship. The libellant claimed the sum of $10,000.00 damages for the several breaches of the marine contract entered into between the libellant and the master and owners of said steamship "Kinau" and the obligations arising therefrom. The claimant filed an answer in this suit on the 5th of April, 1918, and admitted the allegations contained in paragraphs 1, 2 and 3 of said libel, and that the libellant

purchased a ticket for first-class passage on said steamship "Kinau" as alleged in the libel, and that libellant was carried and received on board said steamship, but denied that after the libellant was received on board said steamship he was taken or placed below the main deck, and denied that the second officer, or any officer or employee of said steamship told, required, or forced the libellant to go into the steerage, and/or/ pushed, shoved, or forced libellant in any manner or at all or at any place or time whatsoever or treated him in a rough or improper manner in any respect, and denied that it was dark on the second deck of said steamship, and in further answering paragraphs 1, 2, and 3 of the libel the claimant admits, *"that the said libellant while on the deck of said vessel fell into an open hatch into the hold of said vessel, a distance of about eight feet and struck his head on the floor or some object in said hold and sustained some injury the nature and extent whereof, claimant is ignorant,* and denied that the injuries were serious or permanent and denied that from the effects of the injuries the libellant lost his reason and became insane, and alleged that the hatch in which libellant fell was not improperly open or unguarded or improperly lighted, but that the hatch was open and in actual use at the time for the reception and deposit of freight and baggage, and that the premises around and near said hatch were fully and adequately lighted. By the second paragraph of the said answer, the claimant says that it has no knowledge sufficient to enable it to answer that the libellant was or is insane and requires proof thereof. By the third paragraph of the answer, the claimant further admits that it was a common carrier of freight and passengers by water within the jurisdiction of the Court. And by the fourth paragraph of the answer, the claimant de-

nies that by reason of the injury or injuries sustained by the libellant at the time alleged in said libel that the said libellant was damaged in the sum of $10,000.00 or at all by reason of any act or fault of the claimant, and prayed that the libel may be dismissed with costs. (Apostles pp. 19, 20, and 21.)

At the close of the evidence for the libellant, on the 13th of May, 1918, the presiding judge, upon the statement, not under oath, of the libellant Natalio Peneyra, and two days after he had been discharged from the Insane Asylum, and disregarding all the testimony given upon the hearing, found that the suit should proceed in the name of the real party in interest, to-wit: Natalio Peneyra, and without further testimony as to the condition of Natalio Peneyra, and without the concurrence or action of the guardian *ad litem* or the counsel for the libellant duly appointed by Judge Poindexter as guardian *ad litem* and to conduct this suit, found that the libellant, Natalio Peneyra, had fully recovered and that the injuries sustained by the libellant were not caused by any negligence or failure of duty on the part of the steamship, its owners or officers, and that the libellant was not entitled to recover any damages on account of the injuries, and in accordance with this finding and opinion, thereafter, on the 23rd day of May, 1918, signed a decree dismissing the libel with costs. Judge Poindexter did not preside at the hearing of this suit for the reason that he was absent from the Territory when the suit was heard.

## II.

The findings and decree of the trial court are wholly unsupported by the evidence adduced upon the hearing, and the action of the court in ordering the suit to pro-

ceed in the name of Natalio Peneyra and that he had fully recovered his reason, without any application by the guardian *ad litem* or his counsel was and is wholly unwarranted, and unsupported by the law and the evidence, and it is not unjust criticism to contend that such action amounts to an anomaly and has no place in the regular and due course of the administration of justice in courts of admiralty. This suit was properly commenced by the duly appointed guardian *ad litem* of this insane person who was at the time of the appointment, in the Insane Asylum at Honolulu. The Court had power to make the appointment, and in support of the action of the Court I cite the case of King v. McLean Asylum of the Massachusetts General Hospital, 64 Fed. p. 331. Before discharging the guardian *ad litem,* under the evidence and circumstances disclosed on the hearing of this suit and especially as he did not appoint the guardian *ad litem,* the presiding judge should have required medical testimony as to the condition of the libellant, and he should have referred the matter to a master or have taken the evidence himself before rendering an opinion and taking the action that he did. A discharge from an insane asylum is at most only prima facie evidence of sanity. Aldrich v. Barton, 95 Pac. p. 900. See also Hovey v. Harmon, 49 Me. p. 269. Matter of Rogers, 5 N. J. Eq. p. 46. 10 Ency. Pl. & Pr. p. 1211. Lombard v. Morse, 155 Mass. p. 136.

It is contended that a discharge from an insane asylum made as recently as the discharge of Peneyra was made, before hearing his ex parte statements when not called as a witness and not under oath, simply means that Peneyra was allowed to go out of the Insane Asylum and be at large, and not that he had fully recovered his reason in order to conduct important litiga-

tion such as this suit. I cannot too strongly urge upon this appellate court that the learned trial judge erred in receiving the statement of Natalio Peneyra not under oath two days after he had been discharged from the Insane Asylum as to how and under what circumstances he sustained the injuries on board the steamship "Kinau" and that upon this statement he found him to be sane and without dismissing the guardian ad litem ordered the suit to proceed in the name of Natalio Peneyra, and disregarding the evidence taken on the hearing, found that the injuries of the said Natalio Peneyra were not caused by any negligence or failure of duty on the part of the steamship, its owners or officers, and that the libellant was not entitled to recover any damages on account of said injury. This finding was made notwithstanding that the answer of the claimant did not set up the defense of contributory negligence, and in this connection I cite from paragraph 1 of the claimant's answer,

"Further answering said paragraphs 1, 2, and 3, claimant admits that the said libellant, while on the second deck of said vessel fell into an open hatch into the hold of said vessel a distance of about eight feet and struck his head on the floor or some object in said hold and sustained some injury the nature and extent whereof claimant is ignorant, but upon information and belief claimant denies that said injuries were serious or permanent and denies that from the effects thereof the said Anatalio Pinira (meaning the libellant) lost his reason or became insane." (Apostles, p. 20.)

Nowhere in the answer does the claimant set up the defense of contributory negligence, and the action of the trial judge is not only not sustained by the pleadings nor the evidence given on the hearing.

## III.

The admission was made that the libellant did purchase a first-class ticket from the Inter-Island Steamship Company (meaning the claimant) for a first-class passage from Nawiliwili to the port of Honolulu.

"Mr. Davis: And Mr. Warren also admits that he did purchase a first-class ticket from the Inter-Island Steamship Company for that passage as alleged in the libel.

"The Court: All right, gentlemen." (Apostles, p. 30.) It also appeared from the testimony of Adriano Borha, the guardian ad litem, that he conversed with the libellant while in the Insane Asylum of Honolulu and the libellant denied that he fell down any steamer.

"Q. And he asked you how this case was getting on? Just tell us as near as you can remember what the conversation was and what he said and what you said. A. I asked him whether he remembered when he fell down in the steamer, and he said he doesn't know anything, *and he said he never fell down in the steamer,* but he asked me whether I got his money, and I said, 'Yes, I got your money. I put it in the bank.'" (Apostles, p. 32.)

The witness Henry Aki for the libellant, testified as follows, with reference to how the libellant got on board the said steamship:

"Q. How did he get on board? Just describe to the Court how he got on board, in your own language. A. There is a ladder there on the steamer that is lowered down where the passengers get on. He climbed up and went upstairs and went downstairs and got his luggage and he had a little girl along with him. I presume about five or six years old. And he went downstairs looking around for his luggage and as he goes around in the back by the

hatch where they load up some of the freight, that place was all open.

"Q. Yes, was it light? A. No, sir, it was dark.

"Q. Well, what happened to him? A. It was dark no passengers couldn't see it.

"Q. What happened to him? A. He fell down in the hold.

"Now, did you see anybody there ask him about his luggage? A. No, sir, but I see his ticket.

"Q. What kind of a ticket was it? A. He had a yellow ticket, first-class ticket.

"Q. And you saw that first-class ticket? A. Yes, sir." (Apostles, pp. 35 and 36.)

This witness did not see the libellant actually fall into the hold, but he did see the libellant just before he fell and after he was brought up out of the hold.

"Q. After the man fell, who brought him up out of the hold? A. Two sailors down there. They lifted him up and then there was some other sailors alongside the hatch help pull him out.

"Q. I mean just describe his injuries that you saw there. A. I saw the injuries right on his head there; saw blood on there.

"Q. Well, just describe it to the Court more fully, will you? A. Right on top here, on the head there.

"Q. What kind was it? Was it a wound? A. Yes, blood coming out." (Apostles, p. 39.)

Valentine Cabache, a disinterested witness, called by the libellant, testified as follows:

"Q. Who was it called your attention to it, do you know? A. A fellow by the name Pablo Sanches.

"Q. Was the man's head badly injured, do you know? A. I don't know, but it was covered with blood. His head was covered with blood.

"Q. As to his condition, it has been suggested, was Peneyra sensible or insensible after the accident? A. He was unconscious at the time he was taken from the hold." (Apostles, p. 55.)

Pablo Sanches, a witness for the libellant, saw the libellant fall into the hold of this steamship, and he testified as follows:

"Mr. Davis: Where was Peneyra standing with reference to the hatch when the officers told him to step back? A. It's about six feet far from the hatch.

"Q. How did he have his hand when he told him to move back? A. He kept his hand like that and said, 'Move back, you fellows.'

"Q. Was Peneyra's back to this hatch there? A. About two steps back then he fell inside the hatch.

"Q. Was his back to the hatch or his face? A. Back to the hatch.

"Q. And he did move back? A. He did move back about two feet backwards.

"Q. Did you hear any person order Peneyra to go down to the steerage? A. Yes, the second officer told him to go back because the second officer asked him if he knew how to talk English or can he understand what the officer said, and the officer told him to go down, and he went right straight down and carried his bag with him right where I stayed, and after that the officer told me to explain to all these boys that any passengers who had tickets must stay here and wait for purser.

"Q. He ordered him back. Was he trying to get upstairs then? A. No, he just moved back about two steps and fell inside the hatch." (Apostles, p. 63.)

This witness further testified that it was awful dark,

and it was when the officer gave the command to move back that the libellant fell down the hatch.

"Q. Now, how was it there? Was it light or dark there? A. It was awful dark.

"Q. And it was when the officer gave the command to move back that he fell down the hatch? A. Yes, sir.

"Q. How far did he fall? What's the distance as near as you can judge? How deep was it? A. I think it must be as high as this. I think from that side, I think—

"Q. How many feet? A. About sixteen or fifteen feet, I think." (Apostles, p. 64.)

This witness further testified that the second officer of the steamship ordered the libellant to remain in the steerage.

"Mr. Davis: And who ordered this man Peneyra to stay there? A. The second officer.

"Q. Yes, and then he ordered him back? A. Yes, told him to move back.

"Q. And it was then that he fell? A. Yes, in the hold." (Apostles, p. 65.)

This witness also testified as to the condition of the libellant after falling into the hold.

"Q. Were you present when the man was taken up out of the hold? A. Yes, I was present there.

"Q. Just describe his condition without any leading from me. How was he? A. From what I understand, he didn't know anything. Just like dead. Blood coming out from his nose and mouth and from his ears and also from his head.

"Q. Was he conscious or unconscious? A. Unconscious. You know he didn't know anything.

Couldn't talk and he couldn't do anything. Just like dead." (Apostles, p. 66.)

O. H. Otterson, the chief officer of the steamship "Kinau," a witness for the libellee, testified that at the time of the accident that the port side of the hatch was open and that there was no rope or chain up on that side of the hatch at the time of the accident.

"Q. I thought that was about it. Now we will suppose that this witness stand represents the hatch, see? Now, on the port side of the hatch there was a rope instead of a chain and that rope was down when you saw it? Mr. Warren: Object to that.

"Mr. Davis: I ask if it was a rope instead of a chain. A. Yes.

"Q. Now, the rope was down? A. Yes, because they were taking in cargo.

"Q. On the port side. A. Yes.

"Q. Now, which side of that hatch the man fell down, you don't know because you wasn't there? A. I wasn't there.

"Q. And you didn't see the accident? A. No, I didn't see the accident.

"Q. And the rope was down and the whole side was open at the time when you came down right after the accident? A. Yes, after the accident when I came down the rope was down." (Apostles, p. 165.)

It seems unnecessary to further quote testimony in order to demonstrate that the libellant, a first-class passenger, was ordered back in the steerage quarters towards the open hatch which was unguarded by any rope or chain and into which he fell and sustained the injuries as set out in the libel, and the preponderance of the evidence and the great weight of the evidence establishes beyond question the material allegations

of the libel and that the libellant fell into the open hatch and into the hold of the vessel by reason of the negligence and improper conduct of the second mate of this steamship, and that if he had been warned and if the sides of the hatch had been properly protected by chains or ropes and if the place had been sufficiently lighted, the accident would not have happened and the libellant would not have been injured, and the question involved is whether the appellee were guilty of negligence in ordering this first-class passenger to remain in the steerage and then ordering him to move back close to this unguarded open hatch into which he fell and suffered the injuries complained of.

(U. S. C. C. A. on an accident to a passenger, he being in the exercise of due care, the burden rests on the carrier to show that its whole duty was performed and that the injury was unavoidable by human foresight. *Midland Valley Railroad Co.* v. *Conner,* 217 Fed. p. 956, 133 C. C. A. 638.)

(Evidence held sufficient to raise a presumption of negligence and place the burden of proof upon the defendant. *Lee Line Steamers* v. *Robinson,* 218 Fed. p. 559; 134 C. C. A. 287.)

In this case the doctrine of *res ipso loquitir* clearly applies because there were contractural relations between this passenger and the steamship and the happening of the accident and the injuries sustained by this appellant raises a presumption of negligence against the carrier. There is ample evidence of negligence in this case, and a violation of the contract between the carrier and the passenger. The carrier cannot escape under the evidence in this case, because the libellant was kept in the steerage quarters, was ordered back by the second officer of the steamship

towards this open hatchway and without any warning fell into the same and sustained the injuries from which he became insane and from which, according to the evidence he was still suffering on the hearing of this suit.

> "When carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence; that the personal safety shall not be left to the sport of chance or the negligence of careless servants." (Citing *R. R. Co.* v. *Zerbe,* 14 How. p. 468.)

Although the carrier does not warrant the safety of passengers, at all events, yet his undertaking and liability as to them go to the extent that he or his agents, where he acts by agents, shall possess competent skill and so far as human care and foresight can go, that he will transport them safely.

The carrier is required as to passengers to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise on his part of extraordinary diligence, aided by the highest skill. And this caution and diligence must necessarily be extended to all agencies or means employed by the carrier in the transportation of the passenger. *Pennsylvania Co.* v. *Roy,* 102 U. S. 451, 455, 456; 26 L. Ed. 144.

It is further contended in this case, that the injury complained of is admitted by the answer, and the defense of contributory negligence has not even been set up, and the burden of proof is cast upon the defense to show affirmatively the matters of justification

or defense set up. *Tredwell* v. *Joseph,* Fed. Cas. 14157; *The Rhode Island,* Fed. Cas. 11745. See also *Caldwell* v. *New Jersey Steamship Co.,* 47 N. Y. 282; *Indiana Union Traction Co.* v. *Scrivner,* 93 N. E. 1014, 1021; *LeBlanc* v. *Sweet,* 31 So. 766, 107 La. 355.

This appellate court, while not a court of general equity, nor has it the characteristic powers of a court of equity, but it is bound by its nature and constitution to determine the cases submitted to it upon equitable principles and according to the rules of natural justice. The material allegations of this libel were proven by preponderance of the evidence, and all the evidence was produced, and all those who knew anything about the happening of this accident testified. And the evidence on the part of the libellant discloses negligence and improper conduct on the part of the claimant of this steamship of the grossest kind and character, and a violation of the obligations arising from the marine contract entered into between it and this libellant. And the nature and extent of his injuries fully justify the entering of a decree, for, it is contended, the full amount claimed in the libel. At all events for such damages as will compensate this libellant for the time he lost, for the pain and suffering that he endured, his wounds causing his insanity and in consequence of which he spent four months in an insane asylum away from his little girl, and was prevented from proceeding on his journey to his home in the Philippine Archipelago with the little savings that he had accumulated from the servile labor which he performed under plantation managers on the Island of Kauai, he having accumulated considerable money, which shows the character of the man, and the trial judge should thave taken this into consideration before dismissing this libel in view of all the evidence

adduced before him upon the hearing. This case must appeal and appeal strongly to the consideration of this appellate court, because of the serious nature of the injuries sustained by this libellant, who, although a Filipino and a plantation laborer, was and is entitled to the full protection of our laws, and that when he purchased a first-class ticket he was entitled to the same care and consideration by this steamship company and common carrier that any other passenger, no matter what his nationality might be, was entitled to receive, and a failure of the servants of this company, who knew this hatch was open and unguarded, together with the happening of this accident and under the evidence adduced, it was the plain duty of the trial court to have awarded this libellant substantial damages. The assignments of error filed herein are full and complete. The guardian has appealed, and the libellant, Natalio Peneyra, has also appealed from the final decree entered herein so that there can be no question that the appeal shall be considered on its merits, and that free from technicalities, the real party in interest, Natalio Peneyra, the libellant, shall receive substantial justice on appeal in admiralty, and that the decree of the United States District Court rendered by Judge Vaughan should for all the reasons herein stated be reversed with costs.

Respectfully submitted,

GEO. A. DAVIS,
Counsel for appellant.

Dated at Honolulu, T. H., this 28th day of December, 1918.

No. 3194

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

NATALIO PENEYRA and NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

*Appellant,*

vs.

THE AMERICAN STEAMSHIP "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee, Claimant and Owner Thereof,

*Appellees.*

## BRIEF FOR APPELLEE

*Upon Appeal from the District Court of the United States for the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit.*

L. J. WARREN,
SMITH, WARREN & WHITNEY,
Proctors for Appellee.

No. 3194

# UNITED STATES CIRCUIT COURT OF APPEALS

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*Appellees.*

*On Appeal from the District Court of Hawaii.*

# BRIEF FOR APPELLEE

## THE STATEMENT OF THE CASE

as outlined in appellant's brief purports in the main to recite the allegations of the libel, but with sufficient inaccuracy of result to impel us to allude more particularly to them, as three inconsistent counts, to be borne in mind in following the shifting base of the evidence on the trial.

From the middle of page 3 of appellant's brief the statements should not longer be taken as being from the libel.

The sole issue in this case is that of how the libellant fell into the hold.

The accident occurred on December 19, 1917, and it appears that in January, 1918, (Tr. 137) the libellant was committed as insane, the cause not having been shown; the unsupported claim of Borha, the guardian, being however that it was induced by the fall.

While in the Asylum and with the trial begun and pending both the libellant himself and his guardian applied to the institution superintendent for his examination and discharge (Tr. 136, 140-141), this being a matter apart from the case in court and determinable by the Territorial Insanity Commissioners. After examination by the Commissioners he was by them adjudged sane and his discharge ordered on May 11, 1918 (See libellee's Exhibit 1, Tr. p. 24). The further relevance of the issue of the mental condition of the libellant when he subsequently made his own statements to the trial court will be taken up in connection with the statements themselves.

In Count 1 of the libel (see middle of Tr. p. 9) it is alleged that the libellant "was assisted from said small boat * * * onto the said steamship Kinau and was *taken and placed below the main deck*, * * * and being below the main deck and on the second deck * * * the second officer * * ordered (him) * * to go down into the steerage and then and there *shoved him back* from the side of said steamship and on the second deck thereof, *and* it being dark (*he*) * * *fell* down through an open hatch" (etc.) alleged to have been left unguarded and improperly lighted.

In Count 2 of the libel (at Tr. p. 11), it is claimed in substance that it was the duty of the steamship to have assigned the libellant to that portion of the vessel set aside for first class passengers, instead of which they *"forced"* him and *told him to go* to the steerage quar-

ters, and that in attempting to obey such order he fell into the open hatch.

In Count 3 (at Tr. p. 12) the claim is that libellant was *"ordered and directed"* to go down into the steerage quarters and that they "treated him in a rough and improper manner and *shoved him over towards the hatchway* on the second deck" (etc.), and in attempting to obey he stepped into the open hatch.

Libellant's counsel, in his opening statement to the trial court, said that "the whole thing" was that when libellant went on board "he was ordered by an officer of the vessel to go to the steerage. They made a mistake and thought he was a second class passenger and they *ordered him down to the steerage* and the place was dark and they left a hatch open and they backed him down through the hatchway." (Tr. p. 30).

## CLAIMS OF THE LIBELLEE.

The libellee claims that the libellant came out in the small boat accompanied by his little six or seven years old girl and went all the way up the gangway on the starboard side of the steamer to the upper or main deck where first class passengers are carried and where he was entitled to go and remain, passing by on the way up the steerage entrance through the side of the vessel half-way up. Arrived at the upper deck he wanted to locate his baggage, and, not finding it on the upper deck, left his little girl up there while he voluntarily went to the steerage quarters on the next deck below where baggage was being taken in through the side-port or door on the port side of the vessel, this being on the side opposite from the gangway where he had come up. That he there undertook to look down into the hatch, then half-open on its port side next the port-door to receive incoming baggage from a small boat below, and in some

way lost his balance and fell over the chain guard into the hatchway,—all without the notice or knowledge of anyone, so far as known, that he had left the upper deck or come into the steerage, or even that he had fallen, until after his fall. That no fault or negligence of the ship contributed to the accident.

In making this summary of claims we purposely disregard the testimony of one Sanchez, being unable to extend the least credence to his statements, as we shall indicate.

In addition to all of this the libellant himself was brought into court by his counsel at the close of the trial, and the Court, with the initial idea of determining whether the case should longer stand in the name of the guardian ad litem, questioned him to learn his apparent mental condition. The questioning naturally took the direction of inquiry into the matters in dispute, as affording the best opportunity to gauge an opinion. His replies, which appear on Transcript pages 182-185, so satisfied the Court, not only on the point of sanity, but as to the happening of the accident itself, (removing any lingering doubt about it), that the Court deemed the services of a guardian *ad litem* were unnecessary and further dismissed the libel. The findings appear at Transcript pages 186-188.

Libellant's counsel protested all these proceedings and filed separate appeals and separate assignment of errors, attempting to make two separate appeals, one in the guardian's name and one in Peneyra's name. Both are in the record with the separate assignments of errors. We shall treat the appeals as one.

The various assignments of errors are not separately treated in appellant's brief, and our own treatment of such of them as we deem material will be included in our argument.

Because of counsel's insistence that libellant's own statements to the Court were not "testimony" we will first discuss the whole case apart from them, and then show their own importance and application as affording the Court a further means of determining what the truth was.

## ARGUMENT.

### I. *LIBELLANT VOLUNTARILY WENT TO THE STEERAGE.*

It is clear, even apart from libellant's own statement of the matter, that in boarding the vessel he went first directly to his own proper deck as a first class passenger and was seen there (Tr. 35-36, 44, 45, 80-81, 107,); and took his little girl with him to the same deck (Tr. 35, 44), where he left her sitting on a bench (Tr. 157-158,) on the port side of the upper deck (Tr. 44, 112, 157-158), with a package of matting or mats (Tr. 112, 158). That he looked for his baggage on the upper deck and could not find it (Tr. 45,) and then himself went down to the lower (steerage) deck to look for it (Tr. 35-36).

There is nothing anywhere in the record to support the claim of his having been placed or forced or ordered or shoved to the steerage deck or quarters, or that anyone but himself was responsible for his going or being there. His own witness Henry Aki heard no order of the kind (Tr. 36), nor Cabache (Tr. 52), and no other witness suggested it except libellant's witness Sanchez, whose credibility we challenge throughout.

This development of facts on the trial was apparently recognized by libellant's counsel who then sought, instead, to claim *constructive* force or compulsion in that, the libellant *having come* into the steerage, was *detained* by an alleged order to *remain there* until the purser

should collect his ticket, and, while so remaining, was further ordered to step back out of the way of moving freight, and in so doing fell in the hatch. Testimony to that effect came from one witness only,—Sanchez, (Tr. 63-64, 65), who said that he himself went on board straight into the steerage as a passenger and was there all the time (Tr. 66-67). We urge, however, that Sanchez' testimony is worthless. His story was first to the effect that the second officer (meaning Wailiula the boatswain) told libellant to "go back * * * told him to go right down and he went right straight down and carried his bag with him right where I stayed" (Tr. 62-63, 64.). And yet, throughout all the time covered by Sanchez' own statement the man Wailiula, whom he called the second officer, was *in* the steerage, as was Sanchez himself. Neither could Sanchez in any case have heard any alleged order given to libellant on the upper deck to go down to the steerage, as the decks were as apart from each other as two floors in a flat, and for one to go from the upper to the steerage deck required going down a stairs into a hallway on the lower deck and then turning in an opposite direction along a passageway about 20 feet to a doorway or opening into the steerage (Tr. 58-59). Sanchez himself later inconsistently said that libellant came into the steerage directly from the gangway at the side (Tr. 75-76),—a claim clearly controverted however by the rest of the case that he went upstairs first.

Sanchez further said on the one hand that the second officer told libellant to stay in the steerage until the purser should collect the tickets (Tr. 65), and then that *he, Sanchez,* at the request of the second officer, had in Spanish instructed every man there to that effect, as each one came, including libellant (Tr. 68-69), as he (allegedly) came into the steerage directly from the

gangway on the side of the vessel (Tr. 68, 74-75, 76,) "right where he came on board" (Tr. 76). (On Tr. page 75 the word "hole" should read "hold").

Next, on the point of how libellant fell, Sanchez said first that the *second officer* made a motion and *told Peneyra* to move back (Tr. 62, 63, 64, 65, 70-71), and *then* he said that the second officer was *not* talking *to Peneyra* or any one else except to *Sanchez himself*, asking *Sanchez* to "explain to these boys (Filipinos) who didn't understand that to move back on account might get hurt" (Tr. 71), and that *he* then proceeded to explain it first to every one *except Peneyra* (Tr. 71, 72-73), and *didn't even try* to warn him (Tr. 73), although on his own statement Peneyra was nearest to the hatch (Tr. 71); and that he had "no time" to explain it to Peneyra because Peneyra "was in the hold already" by the time he had explained it to the other boys (Tr. 71).

In other ways Sanchez' testimony does not warrant belief. Once he said Peneyra carried his bag with him (Tr. 63) and then that he didn't have any baggage (Tr. 75). He said once that Peneyra had been upstairs already (Tr. 64) and later that he came straight into the steerage from the side ladder with his baby (Tr. 72, 75) and that the *baby was with him the whole time there in the steerage* until he fell (Tr. 77, and see 72), against which the evidence is overwhelming that the girl was not in the steerage at any time but had been left by libellant on the upper deck (Tr. 35, 44, 112, 158). And certainly it is unlikely that steerage passengers, being in their allotted quarters and having no privilege of going to the upper deck, would be told by the purser or any officer "not to go upstairs *until* the tickets had been collected" (Tr. 65).

The witness Aki, called by libellant, was upstairs be-

fore the accident (Tr. 37), but said he heard nothing said to libellant by any officer (Tr. 36).

Wailiula, in charge of the hatch loading in the steerage at the time (Tr. 82) whom Sanchez thought was the second officer (Tr. 62, 63), denied all knowledge of any order to passengers to stay anywhere on coming aboard (Tr. 86).

Even were it true that libellant, being in the steerage, was ordered to remain there until the taking of tickets or for any other reason, we submit that such could not have been even a remote cause of the later accident,—for even Sanchez said he had *been* there, sitting down, for about fifteen minutes before the accident (Tr. 69). Being in the steerage was not in itself dangerous, and the only effect of having to stay there (if that tale were true) would at most have been a temporary inconvenience.

As to Peneyra's place, where he fell, on Sanchez' story he chose and took it himself, because although told to remain where he was, right where he came inside (Tr. 75-76), he then moved across the ship from the gangway side to the opposite and uncovered side of the hatch on the incoming-freight side, and chose his own position—(so close to it that he, allegedly, fell into the hatch by stepping back only two paces (Tr. 63),—and there stayed (Tr. 75, 77) for about fifteen minutes (Tr. 74, 75).

No witness claimed to have seen the accident except Sanchez. Aki, on the upper deck, did not see what happened (Tr. 36, 37-38), nor did Cabache, who before the accident was also on the upper deck (Tr. 50, 54-55, 56). Both were called by libellant. Wailiula didn't even know that the libellant, as an inidvidual, was there at all until after he had fallen (Tr. 84, 105, 108).

We submit that, as far as known, not a living soul

*saw* Peneyra's fall, or its cause. Many knew of it immediately *after* he had fallen. Though *Sanchez* said "yes" to the question "did you see the accident?" (Tr. 61), it is quite apparent that his testimony of *how* he fell was by his own deductions merely, because he later said that when the second officer told him "to explain to the rest of the boys," then *"I move outside* and talk to the rest of the boys, and not very long after that I *hear* Peneyra *fall in hatch already* so I didn't finish all my explanation and *I run* to where Peneyra fall down" (Tr. 73).

As we have said before, we are passing, for the present, the statements made to the court by the libellant himself as to how he fell in, and why.

The most that can be said of anything said or done by any officer or employee of the ship is that the boatswain, being ready to have baggage come in through the port door from the small boat below to be immediately placed right in this hatch (Tr. 81, 82) called out and motioned to the people, impersonally, to clear the way (Tr. 83-84).

We submit, therefore, that the only possible issues in the case are, whether or not the hatch was improperly left open and unguarded, and whether the place was so improperly lighted that the open hatch could not easily be seen.

## II. *THERE WAS NO NEGLIGENCE OF THE LIBELLEE RESPECTING THE HATCHWAY.*

### (1) *The Hatchway was properly open.*

The hatchway was half open, i. e.—half uncovered (Tr. 55, 68)—at the time of the accident. It was properly open, on its port side half, for the purpose of putting baggage into it coming through the port door from the small boat below (Tr. 62, 67, 81-82, 104, 105, 111,

127, 165). The method of handling was to have the baggage first lifted from the small boat onto a plank staging on the side of the vessel about 3 1-2 feet below the open port door (Tr. 82), and from thence passed through the door to the deck within, and again passed into the hatchway (Tr. 82, 111, 119, 127-128). The stage was *not* "above" nor "forward" of the port door, as the interpreter confusedly put it. Reference to Tr. page 120 will show that when the interpreter said "above" and then "forward" Mr. Warren questioned the interpretation, the witness having used the Hawaiian word "malalo" (not malolo) which means "below" or "under," as the Court might readily infer in view of all the other testimony on the point and as determinable by recognition of the fact that if the staging were forward or above the port door the baggage could not be passed into it. This is of little materiality except that it misled the trial judge for a time (Tr. 126-127), and had to be corrected (Tr. 127-128) and it tends to support our contention elsewhere stated that the interpretation was faulty (See also the partial failure to interpret, challenged and admitted, Tr. p. 105), which we think is largely responsible for the mix-up concerning the *time* of the scolding referred to by Wailiula referred to on page 11 of this brief.

(2) *The Hatchway was properly guarded.*

Libellant's counsel does not urge in his brief on this appeal, as he did at the trial, that after the accident one of the ship's officers told Wailiula it was his fault because he had left the *hatch open.* We wish, however, to anticipate such a claim because we challenge it.

Libellant's witness Aki testified that after the accident the first officer (Otterson) told Wailiula it was the

fault of the boatswain for not *covering up* the hatch (Tr. 41, 42). Cabache said it was because for *not closing* the hatch (Tr. 51). Sanchez didn't even mention it,—and it would have been real grist for his mill had he but heard it or even heard of it.

It does not appear that *prior* to the accident Otterson had come into the steerage and seen the guard chains down, for which he reprimanded the boatswain and ordered them up, which order was carried out (Tr. 97, 160). In discussing this point, we maintain that even if such a statement had been made as claimed it would be incompetent, and while the trial court so ruled or was inclined so to rule (Tr. 41, 42), evidence of the kind was heard (Tr. 51) on counsel's plea that the ruling be reserved. It could not be regarded as part of the *res gestae* or binding on the owners of the vessel because it was not made (if made) until sufficient time had passed after the accident to get the man out of the hatchway and down into the small boat (Tr. 58), which necessitated his being first lifted down onto the staging (Tr. 111). It was too remote in point of time,—perhaps two or three minutes (Tr. 58) or not quite five minutes (Tr. 87) after the accident.

Wailiula's own account of it was confused at first, when he said he had been "scolded" after the accident for "not looking after the hatch" (Tr. 91), but he finally clearly stated on further direct (Tr. 94, 97-98) and cross-examination (Tr. 98, 99, 102) that the scolding was before the accident and that in consequence the chains were put up and were up at the time of the accident (Tr. 97, 98, 102, 107-108). As regards the real or apparent confusion of this witness we submit that the Hawaiian interpretation was poor,—a difficult matter to challenge on an appeal record but of which at least two examples appear, detected even by counsel

having but little knowledge of the language (Tr. 105, 120). See page 10 of this brief.

Otterson, an intelligent man, speaking English, clarified the whole matter. When the accident happened he was standing at the head of the gangway (on the upper deck) receiving incoming passengers (Tr. 157), and on hearing of it went below (Tr. 158). *Prior* to that, between incoming boats, he had left his post and gone into the steerage minutes *before* the accident (Tr. 158-159) and on then seeing no chains were around the hatch gave the boatswain a calling down and ordered them up (Tr. 160), giving as the reason that the steerage passengers otherwise would make their beds on top of the hatch and would have to be gotten off before freight could be put into the hold (Tr. 160), and that he had gone there again a little later, still before the accident, and found them up (Tr. 161). *After* the accident, when he came down he saw the guard had been taken down on the port side (Tr. 162, 165). He then only asked Wailiula how it happened (Tr. 162-163). The very claim that the reprimand was for "not covering the hatch up" (Tr. 42, 51) should show its improbability, because they were at that very time about to put baggage into it, and it had to be open.

There was some testimony for the libellant that the hatch was unguarded. (See "hatch *open*", Tr. 38; and "left open", Tr. 43; and Tr. 48). However, this testimony came from the witness Henry Aki, who was a first class passenger and was on the upper deck until called downstairs after the accident (Tr. 37) and who certainly could not say what conditions were at the time of or prior to the accident.

Even Sanchez only said "one side" was open (Tr. 70).

On the other hand the testimony for the libellee is

positive that at the time of the accident the guards were around the hatch (Tr. 98, 102, 117, 118, 124, 159, 160, 161), one side being guarded by the wall of the ice room (Tr. 103), and on the port side of the hatch, nearest the port-door, the guard was a rope (Tr. 161) which had been taken down to admit of baggage being transferred into the hatch on that side from the port door. (Tr. 83, 103, 161, 165).

Of course as soon as loading is finished the hatch covers are all put on.

(3) *There was sufficient light.*

If, under the circumstances of working at this hatch, there was sufficient light by which the condition of the hatch and what was going on were obvious, it could not be the fault of the libellee that libellant fell in.

The testimony of the witnesses, even on the side of libellant alone, as to the time of day the accident happended, covers a remarkable range of guesses. It should be granted, however, that Hawaiians are more accustomed to note natural phœnomena than to consult a watch.

Of course, on the libellant's side, things were "dark". Aki went too far by saying it was so dark the passengers could not even see the hatch,—i. e.—see that a hatch was there (Tr. 36), or whether it was closed or not (Tr. 60-61). Cabache said "kind of dim; more dark than light" (Tr. 52). Sanchez' statement, "awful dark" (Tr. 64), is characteristic of his whole testimony.

As to the ordinary amount of light outside on a clear day (which we will connect with the inside) at any given hour, the Court will take judicial notice of natural facts, and, therefore (as appears by any almanac

for Hawaii), that the time of sunset on December 19th, 1917, was twenty-two minutes after five o'clock.

Libellant's witness Aki said the accident happened between six and seven o'clock (Tr. 35), at which hour it certainly must have been dark (the twilight in Hawaii is short) and lights would certainly have been in evidence, for certainly the deck would not be left unlighted when operations had to be carried on.

Libellee's witnesses put it variously.

Wailiula, the boatswain, said between three and half past three in the afternoon (Tr. 100, 101); but we think he was merely making an approximate deduction in view of the fact, as he said before, that at about the time of accident he could still see the sun, which he said very positively was still visible "directly above the Pali" (Tr. 86),—"pali" being the Hawaiian word for any precipitous wall or slope,—and he had reference to one of the hills about Nawiliwili Bay in which the vessel was at anchor "some considerable distance from the beach" (Tr. 87). We submit he was right about it being near sunset but in error as to his guess of the hour. This will more clearly appear when we note that if, as Otterson said, the injured man was sent ashore at about 5:30, according to the quartermaster's time, and the accident was at least five minutes before that (Tr. 163, and see 164), then, with sunset due at 5:22, it really happened at about sunset or slightly before.

Kui's testimony indicates that the sun was still lighting the Pali (Tr. 114). He put the time merely as between five and six (Tr. 115). Palis are on both sides of the bay (Tr. 114), and Kui was speaking of the pali on the east side of the vessel being lit up by the sun from over the pali on her west side,—while Wailiula had reference to the sun being over the pali on the vessel's west side.

Aika said the sun was up high and put the hour as between three and four o'clock (Tr. 117)—another Hawaiian guess.

Pua Ku guessed the time as between five and half past (Tr. 129).

Captain Gregory, not assuming to state positively, said about half past or twenty minutes past five (Tr. 150), and it will be conceded that it should be the captain's business to know, which we submit was likely when his sailing was already delayed after five and he must have been anxious to get away.

Kamaiopili, the purser, also said between five and five-thirty (Tr. 152).

Here we indicate that the light inside the vessel at this hatchway was scarcely less than outside. The hatch itself is but a few feet directly inside of and opposite the open double port doors (Tr. 100), and distant about ten feet (Tr. 84, 89-90, 98). The doors were open at the time (Tr. 60, 88, 113, 118, 153) and the opening was ample to admit light not only directly on the hatchway but throughout this steerage deck except back in its end beyond the ice room (Tr. 89). By the somewhat varying judgment of the witnesses these doors were no less than 5 by 6 feet (Tr. 100, 113), and were otherwise mentioned as being large (Tr. 88), about a man's height (Tr. 88, 118).

Aside from the hour, the evidence is very generally to the effect that even in the steerage quarters it was *light* (Tr. 87, 89, 101, 112, 113, 114, 117, 128, 149, 153).

This is strongly supported by the testimony of both the captain and purser, to the effect that when the injured man arrived ashore after the accident the purser was there working on his lists inside the ticket office, by a small window, not opening west, where he saw

well enough to do his checking and writing without any artificial light (Tr. 149, 151-153, 156). Even after the man had then been sent to the hospital, and the freight clerk had returned from that mission, a half hour afterwards, it was still light, and still fairly light at least when all had again boarded the vessel. (Tr. 152-153).

## III. *PENEYRA HIMSELF CORROBORATES OUR CASE.*

The libel in this case shows that on the *ex parte* application of Borha, who filed suit in the name of Peneyra, the Court made an order appointing Borha guardian *ad litem* in the suit, in view, solely, of the allegations made that Peneyra was then insane.

It is true that on the trial Borha offered in evidence (as Exhibit A, Tr. p. 23) a copy of certain letters of guardianship issued to him, referring to Peneyra as an insane person; but this at best made out no more than a *prima facie* or presumptive case of insanity, with no proof of cause, and subject to its being overcome by proof of subsequent recovery, and, unfortunately for his own case, Borha put on medical witnesses who by their testimony as to the subsequent mental condition of Peneyra *did* overcome the merely legal presumption of continuance of insanity, and dispersed it, —for they pronounced him recovered (Tr. 131, 132, 136, 138, 139),—it being admitted that a third of libellant's own medical witnesses, Dr. Michaels, would similarly testify if called (Tr. 142). In fact Borha himself, who had made only *one* visit to Peneyra at the Asylum, a week before the trial (Tr. 31) testified as to his conversation with him on that occasion, which we think shows nothing inconsistent with Peneyra's sanity (Tr. 32-34). He was all right

enough to want to be assured as to the care of his money and his little girl (Tr. 32, 34).

As that was Borha's only visit there, it was on that occasion, according to Dr. Schwallie's testimony, that he said Peneyra was all right and joined with Peneyra in asking for his examination so that he might be discharged (Tr. 136, 140-141). Further, the libellee produced a certificate showing Peneyra's legal restoration to sanity *as well as* his discharge from the Asylum (Tr. p. 24).

The sole legal authority under the laws of Hawaii concerning the examination and determination of sanity and the discharge of inmates of the Insane Asylum, is vested in the Territorial Commissioners of Insanity under Sections 1088 and 1091 of the Revised Laws of Hawaii, 1915, as follows:

> *Sec.* 1088. *Discharge from Asylum.* Any person committed to the Insane Asylum may upon application being made by a sheriff, deputy sheriff or by a relative of such person, and notice given to the superintendent of the Insane Asylum, or upon application by the superintendent, be examined by the commissioners as to his or her sanity, and if a majority of said commissioners shall be satisfied that such person is of sound mind or is not dangerous to the public safety, they shall so certify to the superintendent of the asylum, and such person shall be forthwith released from custody."
>
> "*Sec.* 1091. *All commitments and discharges under this chapter.* No person shall be committed to the insane asylum or be discharged therefrom except as herein provided."

In certifying that upon their examination of the patient and the record of his case before them they were "satisfied that said patient is now sane" (Tr.

24) they expressed their decision under the terms of the statute, as the legal ground for his discharge, and we submit this thereby restored the *legal* capacity of Peneyra.

It is true that this action occurred on May 3rd, after the trial had begun and before its conclusion, but it also appears that the Commissioners then acted at the request of Borha and of Peneyra himself. (Tr. 136, 140-141).

This naturally resulted in making Peneyra himself a competent witness, and we submit that his answers, appearing on Transcript pages 182-186, apart even from other evidence of his recovery, show conclusively *how the accident happened,* and sustained with practically no variance, every theory and feature of the defense theretofore presented.

The conclusion of the Court is concisely expressed in the opinion at pages 186-188 of the Transcript.

Appellant's counsel insists the court should not have considered any statement of Peneyra,—"only two days out of the Asylum", and that the Court improperly dismissed the guardian *ad litem.*

Yet the court questioned Peneyra at the express request of his counsel (see Opinion, Tr. page 186).

The Court had the same right to dismiss as to appoint the guardian *ad litem.*

## IV. ISSUES OF LAW.

To the contention that libellee must pay in this case because the defense of contributory negligence was not specifically pleaded, we say first that where the libel alleges specific negligence and it fails of proof, the libellee is not put to further defense nor bound to explain the accident, and, further, that where the answer makes out a case that libellee has no knowledge

whatever as to how the accident occurred, or what occasioned it, it is not bound to allege and prove facts manifestly beyond its knowledge to support a claim of contributory negligence. We submit that there is no rule or fiction of law which will require a litigant to make allegations of fact outside of his knowledge and be obligated further to prove them, for, we take it, if allegations of contributory negligence are necessary then affirmative proof of them is necessary.

Libellant's counsel invokes the doctrine of *res ipsa loquitur* (brief page 13), to which we reply that this has no application in this case because specific tart was pleaded (ordering, shoving, etc. of libellant into the steerage and into the hatchway), and specific negligence alleged (leaving the hatch open and unguarded and unlighted), as appears on Transcript pages 9-12.

*Hutchins v. "Great Northern,"* decided in Ninth Circuit Court of Appeals, July 1, 1918. (Case No. 3084).

We submit, on our part, that the libellant has fallen far short of the requirement that he prove his case by a preponderance of the evidence. The trial judge, upon the conflicting testimony, entertained no doubt which was entitled to credit.

Where a plaintiff fails to make out a cause of action, the defendant is under no necessity either of pleading or proving contributory negligence.

That the decree should be affirmed, is respectfully submitted.

L. J. WARREN,
SMITH, WARREN & WHITNEY,
Proctors for Appellee.

Dated, Honolulu, Hawaii, January 22, 1919.

# INDEX.

No. 3196

# United States Circuit Court of Appeals

## For the Ninth Circuit.

JULIUS RHUBERG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

# Transcript of Record.

**Upon Writ of Error to the United States District Court of the District of Oregon.**



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of the Attorneys of Record.**

RIDGWAY and JOHNSON,
Northwestern Bank Building, Portland, Oregon,
G. G. SCHMITT,
Oregonian Building, Portland, Oregon,
For the Plaintiff in Error.

MR. BERT E. HANEY,
United States Attorney, and
MR. BARNETT H. GOLDSTEIN,
Assistant United States Attorney,
For the Defendant in Error.

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

UNITED STATES OF AMERICA,
Defendant in Error,

vs.

JULIUS RHUBERG,
Defendant and Plaintiff in Error.

**Citation on Writ of Error.**

United States of America,
District of Oregon,—ss.

To the United States of America, and to B. E. Haney, United States Attorney for the District of Oregon, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the

District of Oregon, wherein Julius Rhuberg is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said District, this 24 day of June, 1918.

CHAS. E. WOLVERTON,
District Judge. [1*]

United States of America,
State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, of the within Citation, also such service by copy admitted of Petition for Writ of Error, Assignment of Error, Order Allowing Writ of Error, and Writ of Error, this 26 day of June, 1918.

JOHN J. BECKMAN,
Assistant U. S. District Attorney for the District of Oregon. [2]

[Endorsed]: No. ——. In the District Court of the United States for the District of Oregon. United States of America, Plaintiff, vs. Julius Rhuberg, Defendant. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Jun. 27, 1918. By G. H. Marsh, Clerk.

*Page-number appearing at foot of page of original certified Transcript of Record.

*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

UNITED STATES OF AMERICA,
Defendant in Error,

vs.

JULIUS RHUBERG,
Defendant and Plaintiff in Error.

**Writ of Error.**

The United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the District of Oregon, GREETING:

Because in the records, and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between the United States of America, plaintiff and defendant in error, and Julius Rhuberg, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear, and we, being willing that that error, if any doth appear, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco, California, within thirty days from the date

hereof, in the said Circuit Court of Appeals to be [3] then and there held, that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 24th day of June, 1918.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck,
Deputy.

Service of the foregoing Writ of Error made this 24 day of June, 1918, upon the District Court of the United States for the District of Oregon, by filing with me as Clerk of said Court a duly certified copy of said Writ of Error.

G. H. MARSH,
Clerk U. S. District Court, District of Oregon.
By F. L. Buck,
Deputy. [4]

[Endorsed]: No. 7788. 24–510. In the District Court of the United States for the District of Oregon. United States of America, Plaintiff, vs. Julius Rhuberg, Defendant. Writ of Error. U. S. District Court, District of Oregon. Filed Jun. 24, 1918. G. H. Marsh, Clerk. [5]

*In the District Court of the United States for the District of Oregon.*

No. 7788.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
JULIUS RHUBERG,
Defendant and Plaintiff in Error.

**Order Enlarging Time for Filing Record and Docketing Case on Appeal.**

Now on this 10th day of July, 1918, the above-entitled case coming on before the Honorable Charles E. Wolverton, Judge of the above entitled court, and the Judge who signed citation upon writ of error in the cause above entitled, upon the motion of counsel for defendant and plaintiff in error for an order enlarging the time within which to file the record and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California; and the defendant in error being represented, and making no objection thereto, and good cause appearing to me therefor; it is now, therefore,

HEREBY ORDERED that said defendant and plaintiff in error, Julius Rhuberg, may have to and including date of August 10, 1918, within which to file the record on his Writ of Error, and docket the case above-entitled with the Honorable Clerk of the

United States Circuit Court of Appeals at San Francisco, California, aforesaid.

CHAS. E. WOLVERTON,
District Judge. [5½]

[Endorsed]: No. 3196. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to August 19, 1918, to File Record Thereof and to Docket Case. Filed Aug. 7, 1918. F. D. Monckton, Clerk.

In the District Court of the United States for the District of Oregon, November Term, 1917.

BE IT REMEMBERED, That on the 1st day of March, 1918, there was duly filed in the District Court of the United States for the District of Oregon, an Indictment, in words and figures as follows, to wit: [6]

*In the District Court of the United States for the District of Oregon.*

INDICTMENT for violation of the Act of Congress Approved June 15, 1917, Known as the "Espionage Act."

UNITED STATES OF AMERICA,
vs.
JULIUS RHUBERG,
Defendant.

United States of America,
District of Oregon,—ss.

The Grand Jurors of the United States of America, for the District of Oregon, duly impaneled,

sworn and charged to inquire within and for said district, upon their oaths and affirmations, do find, charge, allege, and present:

COUNT ONE:

That at and during all the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States was then and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by Congress and duly proclaimed by the President of the United States of America in the exercise of the authority vested in them as by law provided;

That Julius Rhuberg, the above-named defendant, on, to wit, October 27, 1917, at Kent, in the County of Sherman, State and District of Oregon, and within the jurisdiction of this court, then and there being, did wilfully, knowingly, unlawfully and feloniously, attempt to cause insubordination, disloyalty, mutiny, and refusal of duty, in, within, and amongst the military forces of the United States, to wit, men of registration age, and subject to and eligible for [7] draft and conscription under the provisions of the Act of Congress approved May 18, 1917, known as the "Selective Service Law," by then and there stating, declaring, debating, and agitating to and in the presence of said men, and in particular one Corliss B. Andrews, so being of the registration age and subject to draft and conscription as aforesaid, to the injury of the service of the United States, in substance and to the effect following, to wit:

1. That the moneyed men had caused the United

States to enter the war against Germany.

2. That Germany was in the right and the United States was in the wrong, and that he, the said defendant hoped Germany would win and that Germany was sure to win.

3. That the best thing they (meaning the said men of the registration age and subject to draft) could do when in battle would be to put up their hands and let the Germans take them prisoners.

4. That one German could lick ten Americans.

5. That the United States was so slow that Germany would have it whipped before it, the United States, got ready for war.

6. That the United States had no business in the war and ought not to have gone into it.

The said United States then and there being in a state of war with the Imperial German Government as aforesaid, as he, the said defendant, then and there well knew, and said speaking, debating, and agitating as aforesaid, was calculated to and intended by the said defendant to cause insubordination, disloyalty, mutiny, and refusal of duty in, within, and amongst the said military forces of the United States; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege, and present: [8]

COUNT TWO:

That at and during all the time between the 6th day of April, 1917, and the date of the finding of this

indictment, the United States was then and is now at war with the Imperial German Government, said state of war having been on the said 6th day of April, 1917, duly declared by Congress and duly proclaimed by the President of the United States of America in the exercise of the authority vested in them as by law provided.

That Julius Rhuberg, the above-named defendant, on, to wit, the 27th day of October, 1917, at Kent, in the county of Sherman, state and district of Oregon, and within the jurisdiction of this court, then and there being, with the intent, then and there, by him, the said defendant, to obstruct the recruiting and enlistment service of the United States, to the injury of the service and of the United States, did then and there knowingly, wilfully, unlawfully and feloniously obstruct the said recruiting and enlistment service of the United States, to the injury of the service and of the United States, that is to say:

That he, Julius Rhuberg, the said defendant, at the time and place aforesaid, and to effect the purposes and objects aforesaid, did then and there state, declare and depose to one Corliss B. Andrews, and to other persons then and there assembled, the exact number and names of said persons being to the Grand Jurors unknown, amongst other things in substance and to the effect following, to wit:

1. That the moneyed men had caused the United States to enter the war against Germany.

2. That Germany was in the right and the United States was in the wrong, and that he, the said defendant, hoped that Germany would win, and that

Germany was sure to win. [9]

3. That the best thing they (meaning the said men of the registration age and subject to draft) could do when in battle would be to put up their hands and let the Germans take them prisoners.

4. That one German could lick ten Americans.

5. That the United States was so slow that Germany would have it whipped before it, the United States, got ready for war.

6. That the United States had no business in the war and ought not to have gone into it.

All of which statements, declarations, and utterances so then and there made by the defendant as aforesaid, were made with the intent, then and there, on the part of him, the said defendant, to prevent, hinder, delay, and obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States, and to discourage those desirous of enlisting in the military service of the United States, and to persuade and induce those persons subject to and eligible for military service in the United States, to refrain from enlisting in such service, and from complying with the compulsory requirements of the Selective Service Act, which said statements, declarations, and utterances, so made by the defendant as aforesaid, did interfere with and obstruct the recruiting and enlistment service of the United States to the injury of the service and of the United States.

And so the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said defendant, Julius Rhuberg, at the time and place and

in the manner and form aforesaid, did knowingly, wilfully and feloniously, obstruct the recruiting and enlistment service of the United States to the injury of the service of the United States while the said United States was and is at war with the Imperial German Government; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [10]

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege, and present:

COUNT THREE.

That at and during all the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States was then and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by Congress and duly proclaimed by the President of the United States of America, in the exercise of the authority vested in them as by law provided.

That Julius Rhuberg, the above-named defendant, on to wit, the 15th day of November, 1917, at Kent, in the county of Sherman, state and district of Oregon, and within the jurisdiction of this court, then and there being, did wilfully, knowingly and feloniously, make and convey false reports and false statements, with the intent, then and there, on the part of him, the said defendant, to interfere with the operation and success of the military and naval forces of the United States, by then and there stating, declar-

ing, and deposing to one E. R. Sproule, amongst other things, in substance and to the effect following:

1. That the moneyed men had caused the United States to enter the war against Germany.

2. That Germany was in the right and the United States was in the wrong.

3. That the Liberty Bonds will soon be sold for twenty-five cents on the dollar.

All of which said reports and statements so made by the said defendant as aforesaid, then and there were false and untrue, as he the said defendant then and there [11] well knew and all of which said reports and statements, so made by the said defendant, were calculated to and intended by the said defendant, to inflame the minds of the people and to arouse active opposition to the entry of the United States into the war with Germany, and were made with the intent and purpose then and there on the part of the said defendant, to interfere with the operation and success of the military and naval forces of the United States of America as aforesaid, and so the Grand Jurors, upon their oaths and affirmations aforesaid, do say that the said defendant, Julius Rhuberg, at the time and place and in the manner and form aforesaid, did knowingly, wilfully, and feloniously, make and convey false reports and false statements as aforesaid, with the intent of interfering with the operation and success of the military and naval forces of the United States, while the said United States was and is at war with the Imperial German Government as aforesaid; contrary to the form of the statute in such case made and pro-

vided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT FOUR.

That at and during all the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States was then and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by Congress and duly proclaimed by the President of the United States of America, in the exercise of the authority vested in them as by law provided. [12]

That Julius Rhuberg, the above-named defendant, on to wit, between the 1st day of June, 1917, and the 1st day of January, 1918, the exact dates and places being to the Grand Jurors unknown, in the county of Sherman, state and district of Oregon, and within the jurisdiction of this court, then and there being, with the intent then and there on the part of him, the said defendant, to obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States, did then and there, knowingly, wilfully, unlawfully, and feloniously obstruct the said recruiting and enlistment service of the United States, to the injury of the service of the United States, that is to say:

That Julius Rhuberg, the said defendant, at the times and place aforesaid, and to effect the purpose and object as aforesaid, did then and there speak,

debate, and agitate to and in the presence of William Mitchell and Luther Davis, and others to the Grand Jurors unknown, in substance and to the following effect, to wit:

1. That the moneyed men had caused the United States to enter the war against Germany.

2. That Germany was in the right and the United States was in the wrong, and that he, the said defndant, hoped Germany would win, and that Germany was sure to win.

3. That the best thing that they (meaning the said men of registration age and subject to draft) could do when in battle would be to put up their hands and let the Germans take them prisoners.

4. That one German could lick ten Americans.

5. That the United States was so slow that Germany would have it whipped, before it, the United States, got ready for war.

6. That the United States had no business in the war and ought not to have gone in it. [13]

And further, he the said defendant, did then and there, in the manner aforesaid, and to effect the object and purposes aforesaid, state, declare and depose to the persons aforesaid, certain filthy statements, declarations and utterances, the exact words, terms and language of which are too filthy, vile and scurrilous to be here set out and made a part of the records of this court, but which in substance were epithets and terms that were contemptuous, defamatory, and insulting to the institutions, laws and policies of the United States government, and which were then and there intended and calculated to bring

discredit upon the military institutions of the United States and to encourage and procure the disobedience to and violation of the existing laws and policies of the United States relating to the prosecution of its war with Germany; all of which statements, declarations, and utterances, as aforesaid, so then and there made by the defendant, as aforesaid, were made with the intent then and there on the part of him, the said defendant, to prevent, hinder, obstruct, and delay the recruiting and enlistment service of the United States, to the injury of the United States and to discourage those desirous of enlisting in the military service of the United States and to cause disobedience and violation of the existing laws of the United States relative thereto, and which said statements, declarations and utterances so made by the defendant as aforesaid, did obstruct the recruiting and enlistment service of the United States to the injury of the service of the United States.

And so, the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the defendant Julius Rhuberg, at the time and place and in the manner and form aforesaid, did knowingly, wilfully and feloniously obstruct [14] the recruiting and enlistment service of the United States, to the injury of the service and of the United States, while the said United States was and is at war with the Imperial German Government, contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 28th day of February, 1918.

A true bill.

FRANK E. ANDREWS,
Foreman, United States Grand Jury.
BARNETT H. GOLDSTEIN,
Assistant United States Attorney.

[Endorsed]: A True Bill. Frank E. Andrews, Foreman, Grand Jury. Barnett H. Goldstein, Asst. U. S. Attorney. Filed in open court, March 1, 1918. G. H. Marsh, Clerk. [15]

And afterwards, to wit, on Monday, the 11th day of March, 1918, the same being the 7th Judicial day of the regular March term of said court; Present: the HONORABLE CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to wit: [16]

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*In the District Court of the United States for the District of Oregon.*

No. 7788.

March 11, 1918. Indictment. Espionage Act.

THE UNITED STATES OF AMERICA,

vs.

JULIUS RHUBERG.

Now, at this day, come the plaintiff by Mr. Robert R. Rankin, United States Attorney, and the defendant in his own proper person and by Mr. G. G. Schmitt, of counsel. Whereupon said defendant

being duly arraigned upon the indictment herein for plea thereto says he is not guilty. And thereupon upon motion of said plaintiff,

IT IS ORDERED that the trial of this cause be and the same is hereby set for trial for Wednesday, April 24, 1918. [17]

AND AFTERWARDS, to wit, on the 9th day of May, 1918, there was duly filed in said court, a verdict, in words and figures as follows, to wit: [18]

*In the District Court of the United States for the District of Oregon.*

**Verdict.**

UNITED STATES OF AMERICA,

vs.

JULIUS RHUBERG.

We, the jury duly impaneled to try the above-entitled cause, do find the defendant Not Guilty as charged in Count One of the Indictment and Not Guilty as charged in Count Two of the Indictment and Guilty as charged in Count Four of the Indictment herein.

Dated at Portland, Oregon, this 8th day of May, 1918.

HENRY W. HALL,
Foreman,

Filed, May 9, 1918.
G. H. MARSH,
Clerk. [19]

AND AFTERWARDS, to wit, on the 7th day of June, 1918, there was duly filed in said court, a Motion for New Trial, in words and figures as follows, to wit: [20]

*In the District Court of the United States for the District of Oregon.*

UNITED STATES OF AMERICA,

vs.

JULIUS RHUBERG, Defendant.

**Motion of Defendant for Order for New Trial.**

Comes now Julius Rhuberg, defendant above-named, and moves the Honorable Court above-entitled for an order setting aside the verdict and judgment in the case above-entitled and granting defendant a new trial for errors of law committed in the trial of said cause and duly excepted to by defendant as follows:

1.

Error of the Court in admitting and receiving testimony of statements of defendant made prior to the 6th day of April, 1917, and prior to the declaration by the United States of war upon the Imperial German Government over the objection of defendant.

2.

Error of the Court in refusing and overruling the motion of defendant for a directed verdict of Not Guilty for failure of proof of the offense charged in Count Four of the Indictment.

3.

Error of the Court in refusing and overruling the motion of defendant for a directed verdict of Not Guilty upon Count Four of the Indictment by reason of a variance between the charge made in Count Four of the Indictment and the evidence and proof submitted to sustain such charge against defendant. [21]

4.

Error of the Court in failing to give to the jury defendants requested instruction numbered three.

Dated at Portland, Oregon, this seventh day of June, A. D. 1918.

RIDGWAY & JOHNSON,
G. G. SCHMITT,
Attorneys for Defendant.

United States of America,
District of Oregon,—ss.

I, Everett A. Johnson, one of the attorneys for the defendant in the above-entitled cause, do hereby certify that I have prepared the foregoing motion of defendant for an order setting aside the judgment and verdict in said cause and granting defendant a new trial. That in my opinion the said motion is well founded in law and the same is not interposed for purposes of delay.

EVERETT A. JOHNSON.

State of Oregon,
County of Multnomah,—ss.

Due, timely, and legal service by copy admitted at Portland, Oregon, this 7th day of June, 1918.

B. H. GOLDSTEIN,
Asst. U. S. Attorney for Oregon.

Filed June 7, 1918.
G. H. MARSH,
Clerk. [22]

AND AFTERWARDS, to wit, on the 7th day of June, 1918, there was duly filed in said court, a Motion in Arrest of Judgment, in words and figures as follows, to wit: [23]

*In the District Court of the United States for the District of Oregon.*

UNITED STATES OF AMERICA

vs.

JULIUS RHUBERG,

Defendant.

**Motion for Order Arresting Judgment.**

Comes now Julius Rhuberg, defendant above named, and moves the Honorable Court above entitled for an order arresting judgment in the above-entitled cause for the reason that Count Four of the indictment in said cause fails to state facts sufficient to constitute an offense against the United States in the following particulars:

A.

Said count of the indictment wholly fails to allege the intended recruiting or enlistment in the military

or naval services of the United States of William Mitchell or Luther Davis or any other person whomsoever.

B.

That said count of the indictment wholly fails to allege and charge the defendant with knowledge or notice of the proposed or intended enlistment in the military or naval services of the United States of William Mitchell or Luther Davis or any other person whomsoever.

Dated at Portland, Oregon, this seventh day of June, A. D. 1918.

RIDGWAY & JOHNSON,
G. G. SCHMITT,

Attorneys for Defendant.

United States of America,
District of Oregon,—ss.

I, Everett A. Johnson, one of the attorneys for the defendant in the above-entitled [24] court do hereby certify that I have prepared the foregoing motion of defendant for arrest of judgment in said cause. That in my opinion the said motion is well founded in law and the same is not interposed for purposes of delay.

EVERETT A. JOHNSON.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 7th day of June, 1918.

BARNETT H. GOLDSTEIN,
Asst. U. S. Attorney for Oregon.

Filed June 7, 1918.

G. H. MARSH,
Clerk. [25]

And afterwards, to wit, on Monday, the 17th day of June, 1918, the same being the 91st judicial day of the regular March term of said court; Present: the Honorable CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to wit: [26]

*In the District Court of the United States for the District of Oregon.*

No. 7788.

June 7, 1918. Indictment. Espionage Act.

UNITED STATES OF AMERICA

vs.

JULIUS RHUBERG,

June 17, 1918.

Now, at this day, comes the plaintiff by Mr. Barnett H. Goldstein, Assistant United States Attorney, and the defendant by Mr. Everett A. Johnson and Mr. G. G. Schmitt, of counsel. Whereupon said cause comes on to be heard by the Court upon the motion of said defendant for an order in arrest of judgment and upon his motion for a new trial herein, and the court having heard the arguments of counsel and now being fully advised in the premises,

IT IS ORDERED that said motions be, and the same are each hereby overruled. Whereupon, upon motion of said plaintiff,

IT IS ORDERED that the time for the passing

of sentence upon said defendant be, and the same is hereby set for Monday, June 24, 1918, at ten o'clock A. M. [27]

And afterwards, to wit, on Monday, the 24th day of June, 1918, the same being the 97th judicial day of the regular March term of said court; Present: the Honorable CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to wit: [28]

*In the District Court of the United States for the District of Oregon.*

No. 7788.

June 24, 1918. Indictment. Act of June 15, 1917.

UNITED STATES OF AMERICA

vs.

JULIUS RHUBERG,

Now, at this day, come the plaintiff by Mr. Bert E. Haney, United States Attorney, and the defendant in his own proper person and by Mr. Everett A. Johnson, and Mr. G. G. Schmitt, of counsel. Whereupon this being the day set by the Court for the sentence of said defendant upon the verdict herein,

IT IS ADJUDGED that said defendant be imprisoned in the United States Penitentiary at McNeil Island, Washington, for the term of fifteen months, and that he do pay a fine of $2,000, and that he stand committed until this sentence be performed or until he be discharged according to law. [29]

AND AFTERWARDS, to wit, on the 24th day of June, 1918, there was duly filed in said court,

a Petition for Writ of Error, in words and figures as follows, to wit: [30]

*In the District Court of the United States for the District of Oregon.*

UNITED STATES OF AMERICA

vs.

JULIUS RHUBERG,

Defendant.

**Petition for Writ of Error.**

Your petitioner, Julius, Rhuberg, defendant in the above-entitled cause, now comes and brings this, his petition, as plaintiff in error, for a Writ of Error to the District Court of the United States for the District of Oregon, and thereupon your petitioner shows:

That on the 24th day of June, 1918, there was rendered and entered in the above-entitled cause, a judgment in and by said District Court of the United States for the District of Oregon, wherein and whereby your petitioner was sentenced and adjudged to pay a fine of Two Thousand Dollars and be imprisoned in the United States penitentiary at McNeils Island, Washington, for a period of fifteen months.

And your petitioner further shows that he is advised by counsel that there are manifest errors in the records and proceedings at and in said cause, in the rendition of said judgment and sentence, to the great damage of your petitioner, said defendant, all of which errors will be made to appear by examination of the said record, and more particularly by an exam-

ination of the Bill of Exceptions by your petitioner tendered and filed herein, and in the assignments of error filed and tendered herewith. [31]

To the end, therefore, that the said Judgment, sentence, and proceedings may be reversed by the United States Circuit Court of Appeals of the Ninth Circuit, your petitioner prays that a Writ of Error may be issued, directed therefrom to the said District Court of the United States for the District of Oregon, returnable according to law and the practice of this court, and that there may be directed to be returned, pursuant thereto, a true copy of the record, bill of exceptions, assignments of error, and all proceedings had in said cause, that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the errors, if any have happened, may be fully corrected and full and speedy justice done your petitioner.

And your petitioner now makes his assignments of error, filed herewith, upon which he will rely, and which will be made to appear by the return of said record in obedience to said writ.

WHEREFORE, your petitioner prays the issuance of a writ as hereinbefore prayed for, and prays that his assignments of error, filed herewith, may be considered as his assignments of error upon the writ, and that the judgment rendered in this cause may be reversed and held for naught, and said cause remanded for further proceedings, and also that an order be made fixing the amount of security which your said petitioner shall give and furnish upon said writ of error, and that upon the giving of such secur-

ity all further proceedings in this court against the said petitioner be suspended and stayed until the determination of the said writ of error in and by the said Circuit Court of Appeals.

G. G. SCHMITT,
RIDGWAY & JOHNSON,
Attorneys for Petitioner.

Filed June 24, 1918.

G. H. MARSH,
Clerk. [32]

AND AFTERWARDS, to wit, on the 24th day of June, 1918, there was duly filed in said court, an Assignment of Errors, in words and figures as follows, to wit: [33]

*In the District Court of the United States for the District of Oregon.*

UNITED STATES OF AMERICA
vs.
JULIUS RHUBERG,
Defendant.

**Assignment of Errors.**

Now comes the plaintiff in error, defendant above named, by his counsel, and presents this, his assignments of error, containing the assignments of error upon which he will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and specifies the following particulars wherein it is claimed that the District Court erred in the course of the trial of said cause,

1. Error of the Court in overruling the motion of defendant for a directed verdict of not guilty for

failure of proof of the offense charged in Count Four of the indictment.

2. Error of the Court in failing and refusing to direct a verdict of not guilty for failure of proof of the offense charged in Count Four of the indictment.

3. Error of the Court in overruling the motion of defendant for a directed verdict of not guilty of the offense charged in Count Four of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant.

4. Error of the Court in failing and refusing to direct a verdict of not guilty of the offense charged in Count Four of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant. [34]

5. Error of the Court in refusing to give the jury the following instruction:

"Counts II and IV of the indictment, while charging distinct violations by the defendant of the statute known as the Espionage Act, in that the statements alleged to have been made by the defendant Rhuberg, and set forth in these counts of the indictment, were made at different times, and to different persons, are yet largely identical in character. They are both drawn under the same provision of the statute, a provision which makes it unlawful for any person while the United States is at war with any foreign power, to willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service, or to the injury of the United

States. You will therefore note that there are three elements which must be proven before a verdict of guilty may be rendered upon either of these counts of the indictment. First, there must exist the state of war mentioned; second, there must be a wilful obstruction of recruiting or enlistment; third, there must result an injury to the recruiting or enlistment service, or to the United States. I instruct you, gentlemen of the jury, that if the Government has failed to prove to your satisfaction, and beyond a reasonable doubt, any one of these three elements of the offense charged in Counts II and IV of the indictment, your verdict must necessarily be as to these counts a verdict of not guilty. And since the Government has not shown that the statements charged in Counts II and IV of the indictment to have been made by the defendant Rhuberg did in fact result in any injury whatsoever, either to the recruiting or enlistment service of the United States, or to the United States, [35] your verdict upon Counts II and IV of the indictment must be verdicts of not guilty."

6. Error of the Court in refusing to give the jury the following instruction:

"I instruct you, gentlemen of the jury, that before you can find the defendant guilty of the charge preferred against him in the fourth count of the indictment, you must find that the statements charged in that count to have been made by him, or some of them, were made substantially in the form alleged, in the presence of both Luther Davis and William Mitchell, and since it conclusively appears by the

testimony of both the Government and the defense that no such statements or any statements were made by the defendant since the Espionage Act became a law, in the presence of these two men, you must find a verdict of not guilty upon this count of the indictment. It is incumbent upon you to try this defendant solely upon those charges preferred against him in this indictment, and if at times other than those mentioned in the indictment he has violated some law of the United States, he cannot in this trial be tried or convicted of such other offenses."

7. Error of the Court in overruling the objection of the defendant to and receiving in evidence and in permitting the witness Luther Davis to testify to statements made to him by defendant, and conversations had between him and defendant, upon subjects relating to the war, and had and made prior to the entry of the United States into the war.

8. Error of the Court in overruling the motion of the defendant for arrest of judgment by reason of the failure of Count Four of the indictment to state facts sufficient to constitute an offense against the United States. [36]

9. Error of the Court in overruling the motion of defendant for an order setting aside the verdict and judgment of conviction and granting defendant a new trial.

WHEREFORE, defendant, plaintiff in error, prays that the above and foregoing assignments of error be considered as his assignments of error upon the writ of error, and further prays that the judgment heretofore rendered in this cause may be reversed

and held for naught, and that plaintiff in error and defendant above named have such and further relief as may be in conformity to law and the practice of the Court.

G. G. SCHMITT,
RIDGWAY & JOHNSON,
Attorneys for Defendant and Plaintiff in Error.

Filed June 24, 1918.

G. H. MARSH,
Clerk. [37]

And afterwards, to wit, on Monday, the 24th day of June, 1918, the same being the 97th Judicial day of the regular March Term of said court; Present: the HONORABLE CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to wit: [38]

*In the District Court of the United States for the District of Oregon.*

UNITED STATES OF AMERICA,

vs.

JULIUS RHUBERG,

Defendant.

**Order Allowing Writ of Error.**

Now, on this 24th day of June, 1918, this cause coming on to be heard on the motion of the defendant Julius Rhuberg, for a writ of error, and it appearing to the Court that a petition for a writ of error, together with assignments of error, have been duly filed, it is

ORDERED, That a writ of error be and hereby is

allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be and the same is hereby fixed at Five ($5,000.00) Thousand Dollars, and that execution of sentence be stayed pending the prosecution of said writ of error.

CHAS. E. WOLVERTON,
District Judge.

Filed, June 24, 1918.

G. H. MARSH,
Clerk. [39]

And afterwards, to wit, on the 29th day of June, 1918, there was duly filed in said court, a Bond on Writ of Error, in words and figures as follows, to wit: [40]

*In the District Court of the United States for the District of Oregon.*

UNITED STATES OF AMERICA,
vs.
JULIUS RHUBERG,
Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, That we, Julius Rhuberg, the above-named defendant, as principal, and Andy Patjens and Henrich Patjens, as sureties, are held and firmly bound unto the United States of America in the penal sum of Five Thousand Dollars, for the payment of which, well and truly to be made, we bind ourselves and each

of us, our heirs, executors, administrators forever, firmly by these presents.

SEALED with our seals and dated and signed this 29th day of June, 1918.

WHEREAS, at the March term, 1918, of the District Court of the United States for the District of Oregon, in a cause therein pending, wherein the United States was plaintiff and the said Julius Rhuberg was defendant, a judgment was rendered against the said defendant on the 24th day of June, 1918, wherein and whereby the said defendant was sentenced to pay a fine of Two Thousand Dollars and be imprisoned in the United States penitentiary at McNeils Island, Washington, for a period of fifteen months, and the said defendant has prayed for and obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to review the said judgment and sentence in the aforesaid action, and the citation directing the United States to be and appear in the said [41] United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, thirty days from and after the date of said citation, has issued, which citation has been duly served.

NOW, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the said Julius Rhuberg shall appear either in person or by attorney in the said Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for a hearing of said cause in said court, and prosecute his writ of error and abide by the orders made by the said United States Circuit Court of Appeals, and shall

surrender himself in execution as said court may direct, if the judgment and sentence against him shall be affirmed, then this obligation shall be void, otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 29th day of June, 1918.

JULIUS RHUBERG, (Seal)
Principal.
ANDY PATJENS, (Seal)
Surety.
HENRICH PATJENS, (Seal)
Surety.

Signed, sealed, and delivered in presence of:
F. H. DRAKE.
E. A. JOHNSON.

United States of America,
District of Oregon,—ss.

We, Andy Patjens and Henrich Patjens, each being first duly sworn, for himself says: That I am a resident and freeholder in the state of Oregon and that I am worth the sum of Five Thousand Dollars over and above all my just debts and liabilities, and exclusive of property exempt from execution.

ANDY PATJENS,
HENRICH PATJENS. [42]

Subscribed and sworn to before me this 29 day of June, 1918.

[Seal] FREDERICK H. DRAKE,
United States Commissioner for Oregon.

Approved this 29 day of June, 1918.

CHAS. E. WOLVERTON,
District Judge.

Address of sureties: Shaniko, Oregon.

O. K. as to qualification of surety. Haney, U. S. Atty.

United States of America,
State of Oregon,
County of Multnomah,—ss.

Due, timely, and legal service by copy admitted at Portland, Oregon, this 29 day of June, 1918.

B. E. HANEY,
U. S. District Attorney for the District of Oregon.

Filed, June 29, 1918.

G. H. MARSH,
Clerk. [43]

And afterwards, to wit, on the 10th day of July, 1918, there was duly filed in said court, a Bill of Exceptions, in words and figures as follows, to wit: [44]

*In the District Court of the United States for the District of Oregon.*

UNITED STATES OF AMERICA,
vs.
JULIUS RHUBERG,
Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED, That the above-entitled cause came on for trial in the District Court of the United States for the District of Oregon on the 6th day of May, 1918, before the Honorable Charles E.

Wolverton, Judge, and a jury duly empanelled to try said cause, the Government appearing by Mr. Bert E. Haney, United States Attorney, and B. H. Goldstein, Assistant United States Attorney, and the defendant appearing in person, and by G. G. Schmitt and Ridgway & Johnson, his counsel, whereupon, the opening statements having been made by counsel for the respective parties to the jury, the following proceedings were thereupon had.

**Testimony of Corliss B. Andrews, for the Government.**

The Government, to substantiate the issues on its part called as a witness CORLISS B. ANDREWS, who, beng duly sworn, testified that he lived near Kent, Sherman County, Oregon, was twenty-five years of age, had lived in Sherman County about seven years, had married a Miss Patjen, a girl of German parentage, on February 26, 1917, and had registered June 5, 1917, for military service under the Selective Service Act, having married several months before his registration; that witness had registered at Kent, and was subject to draft, although placed in the second class; that he had known defendant about three years, having first met him at the home of one Von Borstel, a farmer near Kent, operating a ranch consisting of about six sections of land; that witness had happened to be at the [45] Von Borstel home because of his acquaintance with sons of Von Borstel, and that this first meeting between defendant and witness had occurred after Germany and the allied nations were at war; that the first discussion witness

(Testimony of Corliss B. Andrews.)

had with defendant concerning war topics was during the winter of 1914–1915, at what is known as the "Mackin ranch," likewise belonging to Von Borstel, and situated south of the town of Kent, the ranch consisting of three or more sections of land, when witness testified that the defendant had stated to him "that this country had no business shipping ammunition over there, that we were not neutral so long as we did that, and that England was trying to shut Germany out of commerce on the seas, and trying to keep them down, and told me what a good country Germany was"; also "that German people had more rights than American people did, and that they were governed better, and were justified in using the submarines, because we had no business shipping ammunition there, and that was the only way they could stop it."

The witness further testified that he had had conversations with defendant at different times, but could not tell the exact times, having seen defendant off and on during all the time between the occasion of first getting acquainted with him, and up to the winter of 1917–1918; that at most of these conversations war topics were discussed between witness and the defendant; that the defendant maintained his former attitude toward the question of the right of Germany in the war.

The witness further testified that he recalled the time when the United States entered the war; that subsequent thereto he had conversations with the defendant concerning our entrance into the war, par-

(Testimony of Corliss B. Andrews.)

ticularly during the Fall, and probably the month of November of the year 1917, after he had registered, and when he was awaiting a call to the service; that the conversations had between witness and defendant referred to, and had subsequent to our entry [46] into the war, were had at the home of Von Borstel, known as the "home ranch," the defendant at that time knowing that witness had registered for the draft, because witness had told him witness testifying that at that time and place defendant told him that if he, the witness, was taken over to France, and was in battle, and got in a tight place, to throw up his hands and let the Germans take him prisoner, and tell them his connections there in Germany, and it would be all right; witness further testifying that defendant told him that this country was too slow, that Germany would have us whipped before we got ready, that Germany was in the right and the United States was in the wrong, and that he, defendant, "hoped Germany would win, and she was sure to win"; also that the monied men had caused the United States to go into the war, and that we had entered the war in order to get our money that we had loaned out; also that in talking about the fighting ability of the Germans defendant had stated to witness that the Germans were fighting one against ten now, and that we would just make the eleventh one, and that one German could lick ten Americans; that defendant further stated to witness that "that stuff that was in the papers about Belgian atrocities were all lies, that they were just trying to stir up the people,"

(Testimony of Corliss B. Andrews.)
and that defendant justified it; that there was considerable talk at that time concerning the constitutionality of the draft law, and that defendant had stated to witness that he did not know whether or not the law was constitutional; that defendant further stated to witness that if the United States kept in the war for two or three years, the Liberty Bonds would not be worth more than twenty-five or fifty cents on the dollar; that the statements testified to were made at different times, witness stating that he had two or three talks with defendant in November, rode with him once on the road, and met defendant once at the Mackin ranch in the spring of 1917, when there to get a bull. [47]

Questioned as to what effect the statements of Rhuberg made prior to our entry into the war, concerning the rights of Germany, and the unneutrality of the United States, had had upon him, the defendant testified that it had made him believe that Germany was right, and being in the right, was justified in doing some of the things that were being done, and that the United States was not neutral, and was aiding England as against Germany; that witness believed that the statements made to him by defendant subsequent to our entrance into the war were made with knowledge on the part of the defendant of the effect thereof upon the witness, basing his belief upon the fact that in discussing these matters prior to the war witness expressed himself, as had defendant, as believing that Germany was right at the time; that defendant had never discussed with

(Testimony of Corliss B. Andrews.)

witness the Lusitania incident, so far as he could recall.

The witness further testified that after he had registered he had been notified by the Government authorities to appear for examination, had been examined, and had been placed in the order of draft, being the last man in the first call. Likewise, that he had been notified three times to be ready to answer a call to the service, the first time by his blue card, to be ready on 24 hours' notice, the next time in October by telephone, and the third time in November by letter; that the conversation had between witness and defendant testified to by him, and relative to throwing up his hands, was subsequent to his second notification; that in discussing with defendant the relative merits and ability of the American and German army, defendant stated to witness that the German army was far superior, because of long training, and that the boys in the United States did not have the constitution to stand up under it; that it came to the mind of the witness that the statements of defendant testified to were made to him by defendant for the purpose of discouraging him, but that defendant had never told him not to go to war. [48]

Upon cross-examination, witness testified that he had lived in Sherman County, Oregon, about seven years, and was then working by the month for one Arthur Hold; was not running his own ranch, and never had; that he had been in Sherman County about four years before meeting defendant, working at different places; that witness believed he had first

(Testimony of Corliss B. Andrews.)

met defendant while employed in the town of Kent at the store of one Erbe, a general merchandise dealer, by whom he had been employed for a few weeks; that he had gone to the Von Borstel home on the occasion of his first meeting with defendant, to see the Von Borstel boys; that he did not recall the time of this first meeting, other than that it was in the fall, nor did he recall any of the circumstances except that he was out there with the boys, and to see them; that he did not remember whether he had any talk with defendant upon the occasion of their first meeting, nor could not say how long it was between his first meeting with defendant and the time when he went to the Mackin ranch for a stay of several weeks, but that the interim between the first meeting and the visit to the Mackin ranch was one of probably two or three months, during which time he did not recall again seeing defendant.

Questioned concerning how his visit to the Mackin ranch came about, the witness testified that he was in town, and one of the Von Borstel boys asked him to go out and stay with them for a while; that he had just been dismissed from his employment with Erbe, was out of work, and at the suggestion of Amandus Von Borstel, who, with defendant, was running the Mackin ranch, he had spent a period of probably two weeks at the Mackin ranch; that during his visit at the Mackin place the defendant Rhuberg did the cooking, and that he, the witness, was pretty near broke when he went to the Mackin ranch on the occasion in question; the witness fur-

(Testimony of Corliss B. Andrews.)

ther testifying that the Mackin ranch was the home of defendant when he was not on the Von Borstel home ranch, defendant making his [49] home on one ranch or the other; that he, the witness, did not know when he next saw defendant after the visit at the Mackin house, but had seen him on different occasions at the Von Borstel home place; that his first talk with defendant concerning war questions was at the Mackin ranch on the occasion of the visit spoken of, and at a time in the Fall of 1914, when the war had just broken out, and the United States was not involved in any way; that it was during that visit, when the defendant told witness about the United States not being neutral, and sending ammunition over to the allies, and justified the submarine attacks on boats of the United States, witness when asked if that was not at a time before the submarine attacks on our boats had been made at all, stating that he did not know, and thought not, and didn't remember just when it started, but that he was pretty sure the subject of submarine attacks had been discussed during the occasion of his visit referred to.

The witness further testified that he had discussed war subjects with defendant ever since he had gotten acquainted with him; that their discussions were more or less general, so far as concerned the war, and that the war might have been a very common subject of discussion whenever one man met another during those years, he, the witness, talking about it quite a bit.

(Testimony of Corliss B. Andrews.)

Questioned concerning the occasion when he visited the Mackin ranch to get a bull, the witness stated that late in the spring of 1917, and after the United States had gotten into the war, witness had gone to the Mackin ranch for the purpose stated, and after having dinner there with the defendant, had gone with the defendant and another to the pasture on horseback to get the animal out of the field; that witness and defendant were talking together on this occasion, but that so far as the witness can recall, nothing whatsoever was said concerning war questions, nor was there any discussion of the war. [50]

The witness further testified that the next occasion he recalled of meeting the defendant was in the fall of that year, while riding to town upon the wagon of a brother-in-law of the witness which caught up with one driven by the defendant, when witness got off the wagon of his brother-in-law and rode for some distance with defendant; that this meeting upon the road occurred in the fall of 1917, and after war had broken out between America and Germany, and that the witness and defendant were the only persons upon or in defendant's wagon on that occasion; that they rode and talked together for perhaps ten minutes, and that while witness had theretofore registered under the Selective Service Act, had been classified, and had gotten his classification serial number, and was expecting a call at any time, all of which he testified was known to the defendant, there was not on that occasion, so far as he could recall, any talk or discussion between

(Testimony of Corliss B. Andrews.)

them whatsoever concerning war subjects, although at that time they had been acquainted for several years, had dined together, had lived in the same house, and had felt friendly toward each other.

The witness further testified that the next occasion of his meeting defendant after the ride of witness and defendant upon the defendant's wheat wagon alluded to, was in October or November of the year 1917, while witness was working for one Clarke and passed through the Von Borstel place in going or coming from the place of his employment to the home of his father-in-law, where his wife was then employed and doing general housework, further stating that his wife had since left the home of her father, and was then employed by some neighbor; that while the Von Borstel house was not upon a public road, it was on the route of the shortest way between Clarkes and the home of the father-in-law; that witness stopped at the Von Borstel house to see one of the Von Borstel boys, but that the boy he wanted to see was not there; that he thereupon went into the Von Borstel house and began talking [51] with defendant, on this occasion not seeing defendant until he went into the house; that he had not been asked into the house, but went in of his own accord, and found the defendant with Mr. Von Borstel; that he did not know how the war came to be the subject of conversation; did not believe he, the witness, had opened up the subject, but could not tell how it started; that it was on this occasion when the defendant Rhuberg told him that if he, the witness, was

(Testimony of Corliss B. Andrews.)

taken to France and got in battle over there, and in a tight place, to throw up his hands and let the Germans take him prisoner, and tell them his connections in Germany, when it would fix it up all right, and that the Germans would take him without any harm.

Witness further testified that he did not know what talk there had been about his connections in Germany, other than that stated; that the connections referred to were his wife's people, she being a girl of German descent, and having relatives living in Germany, some of whom were farmers; that he, the witness, did not know who opened the conversation, or how it came up, or what else was said; that Von Borstel was present at the time, and might have entered into the discussion, but that witness did not know whether he did or not; that he had been married only since the February prior to the conversation referred to, and had been giving some thought to the probability of his service in the army, that being the big question before him at that time. Witness denied that he was thinking more about the subject of his service in the army than any other one thing, stating that it didn't bother him much, and that he had not thought a great deal about it, and that if he had to go, he had to go, and that was all. Asked if he wanted to go, witness stated that "it didn't make any difference only that I was married. I kind of hate to leave my wife. If I was single I would have wanted to go." The witness further testified as follows: [52]

(Testimony of Corliss B. Andrews.)

Q. You hadn't made any effort to enlist prior to that time, had you? A. No, sir.

Q. And isn't it true, Andrews, that you met him there on that occasion seeking advice as to what you should do if you should be taken prisoner over there in France? A. No, sir.

Q. And that what the old man told you was that, if that should happen, he had read that the German army worked their prisoners on German farms, and that, if you should tell your captors that your wife had relatives there who were farming, they might send you to the farm of her relatives, and make it perhaps a little easier for you?

A. That is not the words, as I remember it, no.

Q. Isn't that in substance what he told you?

A. Not in substance, no. I told you what it was.

Q. Well, wasn't there something to that effect said? A. Not in that way.

Q. Wasn't there some discussion about your wife having relatives over there?

A. In the way that I told you before.

Q. Now, you say he told you if you got in a pinch?

A. Yes, sir, tight place.

Q. In a tight place, to do what?

A. Throw up my hands and let the Germans take me prisoner.

Q. Did he ever tell you, Andrews, when you got over in France to desert? A. I don't believe so.

Q. He never did? A. I don't think so.

Q. And the only thing he told you, was that, if you got in a tight place— A. In a battle, yes.

(Testimony of Corliss B. Andrews.)

Q. You understood by that, that he meant where escape was impossible?

A. No, I didn't take it that way, because I told him that, if I saw anybody else do that, that I would shoot him in the back, and would expect him to do the same with me.

Q. You argued the question with him, then?

A. Yes, sir. [53]

Q. Disagreed with him? A. Yes, sir.

Q. Didn't accept his recommendations?

A. No, sir.

Q. As a matter of fact, had you taken the same attitude in discussions at previous times that you had on war questions? A. No, not altogether.

Q. Did you also argue those questions with him?

A. Not at the start, no.

Q. Well, after we got into the war, did you?

A. I believe after we were in the war, yes.

Q. You didn't believe what he told you?

A. Not after we got in the war a while.

Q. And why was it you said you didn't enlist?

A. I was in the draft. I couldn't enlist.

Q. Did you say it was because of your wife, you didn't want to leave your wife, that you hadn't enlisted? A. Not necessarily.

Q. Well, was that the reason, or was it not?

A. I didn't like to leave my wife, no.

Q. And is it not true, Andrews, that you had no intention of enlisting in the army at any time?

A. Not at that time.

Q. Well, at any time?

(Testimony of Corliss B. Andrews.)

A. Not unless I had been single.

Q. Well, you were not single at any time when we were in the war, were you? A. No, sir.

Q. Then you had no intention of enlisting at any time? A. No, sir.

Q. And nothing the old man may have said to you, then, at any time, in any manner, prevented your enlistment. A. I don't believe so. [54]

Q. Well, don't you know that that is the fact?

COURT.—He has already answered the question. He says he doesn't think so. That answers the question.

Q. Now, at that time, in this conversation you speak of where the old man and Von Borstel were present, you say the only thing you recall that was said was that statement that, if you got in a pinch, you should throw up your hands and tell the Germans about your family connections? A. Yes, sir.

Q. The old man didn't tell you, then, or at any other time, to desert, did he?

Mr. GOLDSTEIN.—Whom do you have reference to by "the old man"—Rhuberg or Von Borstel?

Mr. JOHNSON.—Rhuberg.

Mr. GOLDSTEIN.—Why don't you say Rhuberg? A. What was your question?

(Question read.)

A. No, sir.

Witness further testified that the next time he talked with defendant about war subjects was a week or so after, or it might have been a day after, at the Von Borstel house, Mr. Von Borstel and the women

(Testimony of Corliss B. Andrews.)

folks being also present; that he had come to be there in the same way as on the previous occasions; that he had not seen Rhuberg until he went into the house, and had gone in on the invitation, he believed, of Mr. Von Borstel, who was in the room at the time of the conversation had subsequently with Rhuberg; that witness and defendant had discussed war questions as before; that some of the things defendant said were that one German could lick ten Americans, that the United States was so slow that Germany would have us whipped before we got ready, and that moneyed men had caused the war; that he didn't know just how the conversation started; that he, the witness, was not worrying about having to go into the service; that the conversation had taken place in the kitchen—dining-room of the Von Borstel [55] house, in the presence of Von Borstel, and some of the women; that witness did not recall whether he had more than two talks with defendant; that Von Borstel was present at the time of the two conversations at the Von Borstel house, and was usually present when these conversations were had; that witness did not recall having had any other talks with defendant during the fall of 1917.

The witness further testified as follows:

Q. Now, when Rhuberg made these statements on this second occasion there at the Von Borstel house, did you debate them with him? A. Yes, sir.

Q. You didn't agree with him? A. No, sir.

Q. And didn't believe what he said? A. No, sir.

Q. And it was not anything that he said on either

(Testimony of Corliss B. Andrews.)

of those two occasions which has kept you out of the army? A. No, sir.

Q. You were not influenced in any respect by any statement he made after the United States got into the war? Is that correct?

Mr. GOLDSTEIN.—I don't like to object any more than counsel does, but this continuous repetition and reiteration of the same thing, covered at least five different times, as to why he had not enlisted and why he is subject to draft, and the effect upon him, I think, is amply covered and answered. There is no other purpose than merely to sort of humiliate the witness, as far as I can see; to rather insult him; but as far as the facts are concerned, it has been disclosed to counsel time and time again. I think there ought to be a stop to it.

COURT.—I think the question has been answered two or three times.

Mr. JOHNSON.—I would like to have an answer to this question.

COURT.—After he has answered the question, I don't see how you can make it any more emphatic. It only takes up time and doesn't get any result.

Mr. JOHNSON.—My impression is that this particular question has not been answered. I asked him the same question as to particular conversations, but I didn't ask him the general question.

COURT.—He may answer that question. [56]

(Question read.)

A. Not later on, no; I don't remember of any.

Witness further testified that he had been and

(Testimony of Corliss B. Andrews.)

was trying to get money enough together to get a farming outfit and start farming for himself; that something had been said in a joking way out at the Mackin ranch the winter he was there about defendant lending him $1,000.00 for that purpose, but that defendant was not very enthusiastic about lending the money.

Witness further testified that the only times he ever talked with defendant was at defendant's place of business.

Witness was thereupon excused.

**Testimony of Luther Davis, for the Government.**

The Government, to further substantiate the issues on its part, called as a witness LUTHER DAVIS, who, being duly sworn, testified that he lived in Kent, Oregon, was twenty-two years of age, was born in Mountain City, Tennessee, had come to Oregon when he was sixteen years of age, and had lived and farmed as a renter in Kent five years; that he had married on the 28th day of October, 1916, before the draft law went into effect; that he had registered in June of 1917, and had been classified, and was not subject to call; that he was subject to call and had the same position as everyone else until the last classification; that he had known defendant about three years, having first met him at the Van Borstel home; that the first discussion witness had with defendant concerning war topics was early in the spring of 1917, before the United States went into the war, and was had at the home of witness; that defendant was going to or returning from Kent and stopped in and had

(Testimony of Luther Davis.)

dinner with witness and his wife, where the conversation took place. The following proceedings were then had:

Q. Just tell the Court and jury what was said by Mr. Rhuberg.

Mr. JOHNSON.—Just a minute, Mr. Davis, please. I want to interpose the same objection to this testimony that was offered concerning any testimony concerning statements made prior to our entry into the war, for the same reasons that were before stated.

(The objection referred to by counsel for defendant having been [57] interposed by counsel for defendant to question put to the witness Andrews upon his direct examination, and calling for statements made and conversations had with the defendant upon war topics prior to the entry of the United States into the war, and stated as follows: "If your Honor please, while I have no desire to keep out any evidence that might properly be in this case, it seems to me that the evidence of any statements this man made should be confined to a time subsequent to the entry of the United States into the war. Your Honor knows that prior to that time there were many Germans, or men of German birth in the United States whose sympathies were with Germany, but who to-day are just as good citizens and just as loyal Americans as any citizens we have in the United States, and it seems to me that this line of questioning is designed to place this defendant in an unfavorable light with the jury and give to any statements he may have made subsequent to the war a weight

(Testimony of Luther Davis.)

to which they are not entitled. There is every reason to believe that there was, and properly should be, a marked change of sympathy, change of opinion, subsequent to the entry of our country into the war, and on that account I feel it my duty to the defendant to interpose an objection to this character of testimony as it may be called for throughout the trial as incompetent and irrelevant, and having no proper place in the trial of this particular offense." And the court ruling as follows: "This tends to show the trend of the defendant's mind and his disposition towards this Government. I think it is proper. The objection will be overruled.")

COURT.—Very well, the objection will be overruled, and exception allowed.

Q. Just go ahead and tell what took place.

Witness then testified that defendant could get no letters from his wife in Germany because of the censor, and blamed the English for that; defendant saying that the English got ammunition from Americans, and Germany couldn't get anything, that we were sending ammunition to kill the Germans with and had no business doing that; that the United States had no business interfering with the allies, and that we never had been neutral; that Germany was a fine country, far superior to the United States; that you had more freedom, could get anything you wanted there whiskey, or wines, or anything you wanted; that you couldn't get anything you wanted here any more.

Witness further testified that defendant told him

(Testimony of Luther Davis.)
that he had been in the German army about three years, and had been in the Franco-Prussian war; that the training of the German army was far superior to the American army; that he was in the German cavalry training and told what a fine horse he had, and what fine training he went through; that defendant told him of Mr. Von Borstel seeing some American troops in The Dalles, and that they handled a gun like a kid would; that defendant stated to him that Germany was perfectly right [58] in sinking the Lusitania, that ships carrying contraband of war, with passengers on them who had no more sense than to ride in time of war, ought to be sunk; that if this country got into the war Germans in this country would rebel against this Government; that this country was in no shape to fight the German Government, that we were so slow that Germany would have the Allies licked before we got ready to fight, and then come to the United States.

Questioned as to whether all these statements were made prior to our entrance into the war, witness testified that the talk about troops in The Dalles took place along in harvest, about August; that the remarks about the Lusitania, about what a fine country Germany was, and about the militarism there was all prior to the entrance of the United States into the war.

Witness further testified that defendant said that Germany was in the right and she was bound to win; that the German government always took the right

(Testimony of Luther Davis.)

side to everything; that they never had lost a war, and they never would.

Witness further testified that the first discussion he had had with defendant after the United States entered the war was at the Mackin place, at the home of defendant, where witness had gone with his wife after some vegetables, in November of 1917; that they had gone into the front room of the Mackin house where they saw on the wall the Kaiser's picture and one German flag; that there was a little boat on the table under the German flag and the Kaiser's picture, which had three American flags on it. Questioned as to what conversation took place at that time, witness testified that defendant was telling about fighting in the Franco-Prussian war and what a fine army Germany had; that we had no business in the war, had no call whatever to be into the war; that the moneyed men, and men of the shipping interests, and men around these big steel factories in the East making munitions were the men that had brought us into the war; defendant speaking of the sale of liberty bonds told witness that he wouldn't advise any man that didn't have a [59] surplus amount of money to invest in Liberty bonds, for in a couple of years they would go down—they probably wouldn't be worth 25% under par; that he would advise me not to enlist, not to get into the army until after I was drafted; that if a bullet didn't kill me I would die of sickness on account of so many dead people; that defendant knew that witness had registered and was subject to draft; that the effect

(Testimony of Luther Davis.)

of these conversations prior to the war upon witness was to cause him to begin to think Germany was in the right, that the United States was not neutral in sending ammunition to the Allies, and that the sinking of the Lusitania was justifiable. The following proceedings were then had:

Q. Now, what effect did the conversations of Rhuberg have with you subsequent to our entrance into the war?

A. It didn't have much of any, that didn't.

Q. What was the reason of the change?

A. Well, other people talked to me, different people around. I quit visiting Borstels, and other people got talking to me, and I got it out of my head; it put me to thinking.

Answering a question of the Court, witness testified that defendant appeared to be very much in earnest at the time of his last conversation with him about the war, and appeared to try to impress upon the witness what he said.

Upon cross-examination, witness testified that his first conversations with defendant referred to in his testimony had occurred at the home of witness, which was situated on the main road about half way between the Mackin ranch and Kent; that his wife was a daughter of one of the old German families there; that he didn't know whether his wife was acquainted with the wife of defendant, but that he had heard her talk to defendant about his wife; that defendant frequently passed by his home, would come in, and get to talking, and that often witness invited

(Testimony of Luther Davis.)

him in to dinner; that he often stopped in to 'phone over to the Mackin ranch or to Van Borstel's ranch; that the statements made by defendant prior to the war bearing upon the subject of the war usually started through some statement or [60] inquiry relative to his difficulty in hearing from his wife.

Witness further testified that he had never heard defendant claim any of the flags in the Mackin house, but had heard defendant say "that a Wiley kid brought them there, gave them to Tuffy, or something like that"; that they were all little cotton flags, which may have come in boxes of cigarettes; that witness remembered seeing a little American flag on the bedroom door, about the same size as the German flag above mentioned, witness likewise identifying a Yale Pennant and a flag of New Zealand as a part of the wall decorations of the front room of the Mackin house; that defendant had never told him the flags were his, or called the attention of witness to them in any way; that defendant had never advised him to desert in event he had to go into the army; that defendant had told witness of losses his family had sustained in the purchase of German bonds, which had depreciated 33⅓%, and advised witness against buying Liberty Bonds unless he had a surplus amount of money, telling him that they would go down 25%, and that there would be a couple of years that the Government would furnish money to keep them up.

Witness further testified that ten days or two weeks before the last trial of this case defendant had stopped in to 'phone to Von Borstel, and wit-

(Testimony of Luther Davis.)
ness had invited him to stay to dinner. The following proceedings were then had:

Q. Now, these statements that he made to you that you speak of, after we came into the war, they didn't influence you in any way, or deter you from enlistment, did they?

A. No, sir, they didn't keep me from enlisting, but still it made me feel bad.

Q. You hadn't intended or expected to enlist, had you? A. No, sir.

Q. Nothing he said influenced you in the matter, or changed your intentions in any way as regards going into the service?

A. Well, if I hadn't been married, it probably would have. [61]

Q. But you were married? A. I was, yes.

Q. And had no intention of going until you had to?

A. No, sir.

Q. The only reason you didn't go was because of your wife and your baby? A. Yes, sir.

Q. (Redirect.) How old is the baby?

A. Eleven months old.

Witness was thereupon excused.

### Testimony of Mrs. Luther Davis, for the Government.

The Government, to further substantiate the issues on its part, called as a witness Mrs. LUTHER DAVIS, who, being duly sworn, testified that she was the wife of Luther Davis, the witness last above mentioned; that they had been married a year ago last October, and had one child, eleven months of age; that her maiden name was Emma Schassen;

(Testimony of Mrs. Luther Davis.)
that she had been born in the United States, of German parents; that she had known defendant a good many years ago when he lived on his homestead about nine miles west of Kent, and before he left for Germany in 1904, and had met him again when he returned from Germany in 1913; that she had had a conversation with defendant in the summer of 1917, her husband being likewise present, and that defendant was telling her husband not to enlist, because if he would enlist, if he didn't get killed by the German bullets he would by some disease, that anybody that would ride on the Lusitania while the war was going on and it was carrying ammunition ought to be killed, that it was the rich people that were causing this war, and that he, the defendant, was going back to Germany just as quick as the war was over, that he wanted to go back where his wife was, that he didn't like America, and was going back to Germany to live; that America was responsible for not getting his mail through, and that defendant appeared to be embittered against this country. Witness further testified that these conversations occurred in the summer and fall of 1917, between defendant and her husband, and that she [62] had no feeling of animosity toward defendant.

Upon cross-examination witness testified that she had known the wife of defendant about all the time that she lived out here before she moved back to Germany, had been quite friendly with her; that defendant had had dinner at her home several times; that defendant was very much annoyed because he

(Testimony of Mrs. Luther Davis.)

hadn't been able to hear from his wife in Germany, that on the occasion of his calls at the Davis home witness would inquire concerning his wife. Whereupon the following proceedings were had:

Q. And his chief complaint, Mrs. Davis, was because he hadn't been able to get mail from there or get mail to her; isn't that true? A. Yes, sir.

Q. Your husband had made no effort to enlist at any time, had he? A. My husband?

Q. Yes. A. No, sir.

Witness was thereupon excused. [63]

**Testimony of Ray Sproul, for the Government.**

The Government thereupon, to further substantiate the issues on its part, called as a witness RAY SPROUL, who being duly sworn, testified that he lived at Kent, Sherman County, Oregon, where for the past five years he had been engaged in farming a rented farm in connection with a homestead upon which he had not yet proved up; that the ranch upon which the witness lives is distant about three miles from the Mackin ranch, where the defendant Rhuberg resided; that witness had known defendant for about three years; that witness is thirty-four years of age, was born in Nebraska, but had lived in the states of Oregon and Washington most of his life, and had lived in and about the town of Kent for about five years.

The witness further testified that either the last of October or the first of November of 1917, he had had a conversation with defendant upon subjects re-

(Testimony of Ray Sproul.)

lating to the war, the conversation occurring after the United States had entered the war, and taking place along a fence then being repaired. The witness was then asked how the conversation happened to take place and answered:

A. Well, I got a stack of straw from Charley Owens, I traded for some hay, and this was on Borstel's place. And when I got the straw Charley Owens told me I could not pull it out, after it got wet, over the ground, unless it froze up. Well, it had rained a little, but not very much, so I stopped and asked the boys if I could haul it out, and they said yes. So we went ahead talking a little while, and I made the remark they were certainly blowing things up in Europe. The boys said, yes. Mr. Rhuberg, he says, "That is just what the Germans want." "Why," I says, "I should think it would make food short over there." "Well," he says, "It is all on French and English ground." And I says, "Well, that will probably change when the American soldiers gets over there." And he says, "No. No," he says, "they will never step foot on German soil. One German is equal to a dozen Americans."

Q. What did you say in response to that?

A. I says, "We will see."

Q. Is that the sum and substance of the conversation? [64] A. That was all.

Q. Did you ever talk with him after that, or have any conversation? A. No, sir.

Q. You were through with him? A. Yes, sir.

Upon cross-examination the witness testified that

(Testimony of Ray Sproul.)

on the occasion of the conversation with defendant just related, four persons were present, namely, the defendant Rhuberg, Frank Von Borstel, Emanuel Von Borstel, the latter called "Tuffy," and the witness; that the Von Borstel boys, while present and within hearing, took no part in the conversation; that defendant and the Von Borstel boys were working upon one of the Von Borstel fences along the line of a part of the Von Borstel land, the defendant at that particular time sitting upon a wagon loaded with fence posts; that witness came up to where the men were working while driving with his buggy to Kent, and that the defendant had not gone out to look the witness up.

The witness further testified that the only statements made to him by defendant at that time were those related by him upon his direct examination, and that defendant had not stated to witness that the moneyed men had caused the United States to enter the war against Germany and had not stated to the witness that Germany was in the right and the United States was in the wrong, and that defendant had not stated to witness that the Liberty Bonds would soon be sold for twenty-five cents on the dollar, and that he, the witness, had never at any time said that defendant had made those statements to him.

Questioned as to what business he had followed, other than farming, witness testified that he had worked in [65] the lumber business and farming, witness denying that he had at any time run a saloon or worked in one, the witness further stating that

(Testimony of Ray Sproul.)

the occasion related was the first time he had ever met the defendant to talk to him, and that he, the witness, had started the talk on that occasion by his remark to the boys that they were blowing things up pretty much over there.

The witness thereupon testified as follows:

Q. Mr. Sproul, I forgot to ask you whether or not this talk that you had with Rhuberg that you testified concerning operated to prevent you in any way from entering the military service?

A. Why, sure not.

Q. Beg pardon. A. Certainly it did not.

Q. You are a man of family? A. Yes, sir.

Q. And at that time that you talked with the defendant, or prior to that time, you had no intention of enlisting in the army? A. No, sir.

Q. Or the Naval service? A. No, sir.

Q. You didn't pay any attention to what he said, did you?

A. No, sir. It had no effect on me, because I knew better.

The witness was thereupon excused.

**Testimony of William Mitchell, for the Government.**

The Government, to further substantiate the issues on its part, called as a witness WILLIAM MITCHELL, who being duly sworn, testified that he lived at Kent, Sherman County, Oregon, where he had resided for about five years; that he was born in Michigan, but had been in the state of Oregon for about seventeen years, residing in Portland, Oregon,

(Testimony of William Mitchell.)

Vancouver, Washington, and San Francisco, California, prior to coming to [66] Kent; that his business is farming, he operating a rented farm and a homestead which joins the Mackin ranch; that he has known the defendant Rhuberg for about two years or a little more, having first met him two years ago last harvest.

Witness further testified that he thought he knew how the defendant feels about the war between the United States and Germany, having talked to defendant in June of 1917; that on the occasion of the conversation referred to defendant was either loading or unloading rock along the road, witness going over across the road to where defendant was working for a drink of water; that defendant stated to him that if they were in Germany they would not have to drink old water, but would have a jug of beer, and that thereupon the talk about the war started.

Questioned as to just what defendant said about the war, witness stated that defendant said to him that this country had no business in the war against Germany, it was not our war, the working people's war, it was the rich man's war, and that they would be helpless anyway, and that before we could do any good the West front would be taken and the French and English whipped; that it would take ten Americans to stand off one German and that we were wrong in entering the war, as it was not our fight; that the rich men had caused the war, and it was not our war; that the conversation in question took place after war was declared between the United

(Testimony of William Mitchell.)

States and Germany, and witness thought in the first part of June of 1917.

Upon cross-examination, and concerning the time of the conversation referred to, the witness testified as follows:

Q. The first part of June?

A. I think so; the first part of June; somewhere between the 5th and 20th, anyway; somewhere along there. [67]

Q. You think it was the first half of the month?

A. Well, I think it was along about the 9th or 10th of the month, or 11th. It was two or three different days there.

Q. You think it was before the 15th?

A. Yes, I think it was; but I am not sure, though.

Q. Was Luther Davis present at that talk?

A. No, sir.

Q. Did you ever have any conversation with the defendant on subjects of the war, except that one you speak of?

A. None, not to speak of, except that one.

Q. You never did have any conversation with the defendant at which Luther Davis was present?

A. No, sir.

Q. Did you ever state to the grand jury or to the district attorney that you had? A. No, sir.

Q. This indictment charges that certain statements were made by this defendant in the presence of yourself and Luther Davis.

A. It is a mistake.

Q. Is that a fact? A. No, sir, it is a mistake.

(Testimony of William Mitchell.)

The witness further testified that on the occasion of the conversation related defendant was working upon the Von Borstel lands and prior to that time had been living at the Mackin ranch, which witness supposed was owned by Von Borstel; that he went over to where defendant was to help defendant load or unload two or three large rocks; that witness had been working just across the road from defendant's place of employment, and that he had come to where defendant was employed, and that defendant had not come to him.

The witness further testified as follows: [68]

Q. What did you say your age was?

A. 34 or 35. I think 34.

Q. Married man? A. Yes, sir.

Q. Family? A. Yes, sir.

Q. How many children? A. Four.

Q. Youngsters? A. How?

Q. All young children?

A. Yes, sir. The oldest one is 10 years old.

Q. You are outside the draft age? A. Yes, sir.

Q. Were when the draft law was passed?

A. Yes, sir.

Q. Is it because of your wife and children that you have not enlisted?

A. Well, I expect that is one thing that has kept me from enlisting.

Q. It wasn't anything the old man said to you that has kept you from enlisting?

A. I haven't ever thought anything about enlisting, on account of my family.

(Testimony of William Mitchell.)

Q. Isn't it a fact you didn't pay any attention to what he said?

A. No, I didn't pay any attention, any more than I would anybody else's talk. I am an American citizen. This is my government.

The witness further testified that the purpose he had in mind in going over to the place of employment of the defendant was to get a drink of water, having no water with him, and being very thirsty.

The witness was thereupon excused. [69]

**Testimony of Trueblood Smith, for the Government.**

The Government, to further sustain the issues upon its part, called as a witness TRUEBLOOD SMITH, who, being duly sworn, testified that he lived in Moro, the county seat of Sherman county, Oregon, and distant twenty-five or twenty-eight miles from Kent, Oregon; that he is the pastor of the First Presbyterian church at Moro, and had been in charge of that church since May 16, 1917; that the only time he ever met the defendant Rhuberg was on June 20, 1917, at the Mackin ranch, some four or five miles southwest of Kent, where he had gone with one Bourhill; that Bourhill was then engaged in the organization of a bank in Moro, known as the Farmers State Bank, and of which he, Bourhill, is now cashier, Bourhill asking witness to accompany him for companionship, and incidentally that they might attend the Red Cross meeting held in Kent on that date.

The witness further testified that they first went

(Testimony of Trueblood Smith.)

to Grass Valley, where they stopped for a few minutes, then went to several ranches in that vicinity to see stockholders in the new bank, leaving the Sam Holmes place in time to get to the meeting held in the school house at Kent, referred to; that on the day in question witness was wearing upon his sleeve a Red Cross arm band made of a red cross of cloth sewed upon a white cloth field, which was still upon his sleeve at the time he met and talked with defendant.

The witness further testified as follows:

Q. What conversation, if any, did you have with Mr. Rhuberg at that particular occasion?

A. The conversation started—when we drove up, Mr. Bourhill drove his auto into the barn lot of this Mackin ranch, which is owned, or at least controlled, by Mr. Von Borstel; and when we drove up into the lot, Mr. Rhuberg was in the barn lot. Mr. Bourhill asked him if Mr. Von Borstel was at the house, or at the place, I believe he said he was at the house at that time, I believe just a short distance **[70]** from the barn. Mr. Bourhill introduced me to Mr. Rhuberg, and then he started to the house; asked me if I would come with him. I said, "No, I will just stay here, and talk with Mr. Rhuberg while you are at the house." I knew his business was nothing that concerned me at all, or the Red Cross. So, as I say, he did introduce us, and I said I would stay there. Mr. Rhuberg asked—looking at the red cross—"What is this for?" or something. I said, "Oh, this is"—looking at my sleeve, I said, "We are

(Testimony of Trueblood Smith.)

solicitors for the American Red Cross." "Well," he said, "if Mr. Bourhill asks him he will get no contribution from Mr. Von Borstel for the American Red Cross Society." I says, "That is not his business at all. This is out of our territory. We are solicitors for the Moro district." Then Mr. Rhuberg made several statements concerning our relations with Germany; one of them in which he stated that we had no reason whatever for going to war with Germany; and of course at once I asked him concerning the sinking of the Lusitania. I believe that is the only one I mentioned. He said the Germans sank that vessel and others because they were lending aid to the enemies of Germany, and that we had no right at all to go in; no cause to declare war against Germany. He said, "The trouble with the United States is this Government will not permit its people or the papers to publish the truth concerning Germany. If so, the American people would not fight Germany; if they knew the truth concerning Germany."

Q. What did he say with respect to the funds for the Red Cross, as to the necessity of the Government?

A. Well, one of the first questions was, when he said "What are you folks out here for? Do you wish funds for the American Red Cross?" He says, "You have no wounded soldiers." He says, "I support the German Red Cross Society, for we have many wounded soldiers, and need for funds."

(Testimony of Trueblood Smith.)

Q. Did you know at that time he was an American citizen?

A. Whether I knew it just at that time, he told me there just before, or in that same conversation, he told me that he was a naturalized American citizen; and incidentally he told me also that his wife was then living in Germany.

Q. Did he use the word "You" have no wounded?

A. That is, those were the words that I remember was, "Why do you wish funds for the American Red Cross Society, for you have no wounded soldiers."

Q. And he said "We" have wounded?

A. He says, "We have many wounded soldiers, and need for funds." He said, "I support the German Red Cross Society." [71]

Q. What did he say, if anything, with respect to the feeling of Germany against America?

A. He said in just these words, the exact words—at least that is the thought—he says, " The feeling in Germany is very bitter towards the United States for her going into the war against Germany." It was in that connection he says, "We"—the United States, meaning—"We have no cause to go to war with Germany, for Germany had only destroyed the vessels that were giving aid to the enemies of Germany."

On cross-examination the witness further testified:

Q. He said "We" had no cause?

A. He said we had no cause.

Q. To go into the war—is that correct?

(Testimony of Trueblood Smith.)

A. By that I didn't mean those were his exact words. The thought was, whether he said, "The United States has no cause. The "we"—I put the word "We" myself. I won't say Mr. Rhuberg said "we" had no cause; but the thought was the United States has no cause for entering into this war with Germany.

Q. What were his exact words?

A. As I said, I didn't make any note of them at all, except the thought he expressed was that we, the United States—whether he said "we" or whether he said "United States"—had no cause to go to war with Germany, I won't say.

Q. Did you make any note of these other statements that you attempt now to give?

A. Do you mean write them down at the time? I certainly wrote nothing down at the time at all.

Q. You have attempted to give the jury a verbatim statement of some of his other words, haven't you?

A. In the same sense I remember the one statement—I remember the exact words, that very terse, short statement—let me give these two statements I verify: these are the way they were given to me: He says, "The feeling in Germany is very bitter towards the United States for going into this war with Germany." Another one was, he said, "It would be very difficult for me to return to Germany at the present time." Those were his exact words. But whether he said "We" had no cause to go to war with Germany, or whether he said the "United

(Testimony of Trueblood Smith.)

States'' had no cause, I won't say.

Q. This conversation you had with him was the only conversation you have ever had?

A. The only conversation I ever had with Mr. Rhuberg. **[72]**

Q. That was had upon his place of residence?

A. It was, as I said, on the ranch—the Mackin ranch, which is owned or controlled by Mr. Von Borstel.

Q. Did you understand that that was the place of residence of the defendant?

A. I have heard it since, that he stays with Mr. Von Borstel. I don't know. I didn't know it was permanent at all. I know that is where he was on that afternoon. I think Mr. Bourhill told me—I asked him if he was working for him—if he had rented that place. Mr. Bourhill informed me that he thought he was staying with Mr. Von Borstel, whether as hired man or whether he was staying there for his board or not, I knew nothing of the relation.

Q. He was working out around the barn when you went there?

A. I took that for granted, for he was in his working overalls, if I remember correctly. But at the time I saw him he was doing no work at that time. I understood he was helping Mr. Von Borstel on the ranch.

Q. Is that the time you mistook one of the stallions for a mare, or vice versa?

A. If I ever did, that must have been the time.

(Testimony of Trueblood Smith.)

Q. Well, did you?

A. Not to my knowledge. I think I know the difference, having spent some thirty years on a farm.

Q. Now, you have taken a very active interest in this case, have you not?

A. I would rather you would put that clearer.

Q. Well, have you not stated from time to time that you would like to see the old man convicted, or words to that effect?

A. I think I have made that statement; that I thought he deserved conviction.

Q. And you would like to see him convicted?

A. If the evidence is sufficient, I certainly should like to see him convicted; truly.

Q. How old are you? A. 36 March 7, 1918.

Q. Did anything that the old man said to you that day or any other time—

Mr. GOLDSTEIN.—You mean Mr. Rhuberg?

[73]

Q. The defendant—influence you in any way against enlistment in the army or navy?

A. Why, no, I cannot say that it did, for I knew I was physically incapable of bearing arms, and I knew I was past the age for the draft; couldn't have been accepted if I had applied.

Q. You had no intention, at that time or at any time theretofore, of enlisting in the army or navy?

A. Not in the army or navy, no. The Y. M. C. A. work has appealed to me; but I have made no application even for that, so his words did not influence me against enlistment in the army.

(Testimony of Trueblood Smith.)

Q. You paid no attention to them, as far as that is concerned?

A. I paid no attention, as far as I was concerned; but, as a minister of the Gospel, and one who was expected to take an active interest in the things that were for the welfare of the United States, it certainly did affect me in that way, and I was much surprised that a man of his intelligence would be guilty of speaking upon a first meeting to any one such words as he gave.

Q. Did you make any effort at that time, Mr. Smith, to show the man the error of his way?

A. I think I made nothing—except I tried to talk to him concerning calves, and not stallions or mares. He had some very nice calves there. In fact, I tried to get him to talk concerning the stock rather than the subject he was talking upon.

Whereupon the Government rested.

Thereupon the defendant moved for a directed verdict of not guilty in connection with which proceedings were had as follows:

Mr. JOHNSON.—I desire to move the court for a directed verdict upon Count 1 of the indictment, for the reason there is no evidence here of an attempt to cause insubordination, or disloyalty, or refusal of duty in the military forces of the United States;

For the same verdict upon Counts 2 and 4 of the indictment, for the reason that there is no evidence here showing in any degree, or any evidence from which the jury may conclude in any degree, any injury to the recruiting or enlistment service of the

United States, or to the United States.

COURT.—That is in effect the motion you made before? (The motion referred to as "made before" having been made in the first trial of the cause, which resulted in a disagreement **[74]** of the jury and a mistrial as to Counts 1, 2 and 4 of the indictment, Count 3 of the indictment having been dismissed by the Government upon the statement of the Court that an instruction would be given the jury to acquit upon that count.)

Mr. JOHNSON.—Yes. There is one other ground that I want to predicate the motion on as concerns the fourth count of the indictment, and that is the fact that there is a variance between the charge and the proof. The charge is that on a date which is not stated, but some time between the first day of June, 1917, and the first day of January, 1918, certain statements in that count of the indictment set forth were made in the presence of Mitchell and Davis. the evidence of the Government expressly negatives those facts, as there was no statement made in the presence of these two men, either among those set out in the indictment or otherwise; and on that ground I ask that we have the same ruling on the fourth count that we have asked for on the first and second.

It likewise appears from the statements of Mr. Mitchell that any statements made to him were made before the law under which this man is being tried became effective. He stated, as your Honor will remember, that, as nearly as he can recall, the statements were made to him the 9th or 10th, per-

haps the 11th of June, prior to the date when this law was passed.

COURT.—The motions will be overruled.

Mr. JOHNSON.—We save an exception.

Mr. SCHMITT.—Both motions are overruled?

COURT.—Yes.

Mr. SCHMITT.—And exceptions to both.

COURT.—Very well.

Mr. JOHNSON.—Count 3, I understand, is not involved in this suit?

Mr. GOLDSTEIN.—I abandoned count 3 before, and dismissed it, so it is out. We only have counts 1, 2 and 4.

COURT.—Count 3 is dismissed?

Mr. GOLDSTEIN.—Count 3 is dismissed. **[75]**

WHEREUPON the defendant, to substantiate and sustain the issues upon his part and his plea of not guilty, became a witness in his own behalf, and being duly sworn, testified as follows:

**Testimony of Julius Rhuberg, in His Own Behalf.**

Questions by Mr. Johnson:

Mr. Rhuberg.—You are the defendant in this case?

A. Yes, sir.

Q. What is your age?

A. I will be 57 in August.

Q. When were you born, if you know?

A. The 20th of August, 1861.

Q. And where were you born?

A. In Schleswig-Holstein, in a town named Pinneberg.

(Testimony of Julius Rhuberg.)

Q. Do you know under the rule of what country Schleswig-Holstein was at the time of your birth?

A. It was under Danish rule. The King of Denmark was the dictator of Schleswig-Holstein. 1864 to 1866 we had war against Germany and Austria; then we became a Prussian province after 1866.

Q. From 1866 on, where did you reside?

A. I stayed home. I stayed home till 1873. Then I went to Hamburg. Hamburg is a free city—republic. I went there to school. After my schooling, I went then to Hamburg, in the merchandise business, as an apprentice I stayed in this business work a year for my father. My father was merchant. Till I had to go to the army, and I served three years in the Prussian army, the German army. And as soon as I got through my army service, it always was my wish to become a farmer, but my father was **[76]** against it. And I had an uncle living in Nevada. He settled in 1852 in Southern Nevada. And I like to go then. So I went in 1884, early, in the spring, I went over to Nevada. I stayed two years.

Q. Where did you go? Where in Nevada did you go?

A. In Nye County; Fish Lake Valley. He came out in 1848 to Nevada, and settled on his place in 1852.

Q. What sort of ranch was it?

A. It was stock ranch.

Q. How long did you remain there in Nevada?

A. We stayed—after I was a year there, then I

(Testimony of Julius Rhuberg.)

helped him—he bought a place out of Los Angeles, and I helped him drive down a bunch of horses. We was 24 days on the road. And I stayed awhile in that place in Los Angeles, but I didn't like that; it was too hot in farm work. So I went back on the ranch in Nevada. In 1886 I came up here to Oregon, and met a man who gave me work, and I worked one year with sheep—herded sheep.

Q. What were you doing with the sheep?

A. That year, in the winter time, we camped out all winter, and herding and packing them both. Next year we went up—in 1888 or 1889 we went up to Big Bend country with our sheep. We took them sheep on shares, the herder and I. We went up to Big Bend country, in that hard winter, and we did, in one way we lost 800 head, and had a big hay bill to pay; so that the first year what I made, I lost it all again. We went back to Oregon. We thought Oregon was, after all, better sheep country *as* Big Bend country. And I worked with sheep till 1893. I took sheep on [77] shares; run sheep on shares myself.

Q. Whom were you working for?

A. For Charley Wiegand. He is old friend of mine. He is at present in San Diego, and he know me long years.

Q. How long did you work for Wiegand?

A. I worked one year, and then took the sheep on the shares. Afterwards I had sheep for another man named Seecamp.

Q. How long did you work for him?

(Testimony of Julius Rhuberg.)

A. Several years, up till 1883, I came back with sheep band. I worked in warehouse, for Mr. A. C. Hanson & Co.

Q. Do you mean 1883?

A. No, no, 1889 and 1890, after we lost those sheep, I was disgusted with sheep, and I worked awhile for Mr. A. C. Hanson. After all I went back to sheep again, and worked till 1893. Then in 1894 I lost nearly everything, and so I went over—I knowed a big sheep man, Mr. Hinton, when I got employment with them, I worked six years for Mr. Hinton. Then that time I took up my homestead there in Sherman County, and in 1900, late in the fall, I came out of the mountains, I told Mr. Hinton I had letters, I like to go and see my parents again. So I just came to Hamburg about Christmas time. And right after Christmas I got acquainted with my wife, and married in March, and in April, or in May, I brought her out here to Sherman County.

Q. What did you do when you got back to Sherman County?

A. I went out on to my ranch, and farmed it for myself.

Q. And where was your ranch? **[78]**

A. It was six miles west of Kent.

Q. What kind of a ranch was it?

A. Wheat ranch. 160 acres. I had 100 acres plowed of it.

Q. Was that the homestead you say you took up before you went back for this visit in 1899?

(Testimony of Julius Rhuberg.)

A. Yes, that was the homestead. In 1899 I went to Germany.

Q. Yes, I say, was this the homestead?

A. Yes, that was the homestead, yes.

Q. What kind of land was it when you took it up first, the homestead?

A. It was unimproved. It was bunch-grass and sage-brush. Some scabby. I had a whole lot of work on it. I fenced it, and it took me several years to get it in good working condition.

Q. What kind of buildings did you put on it, Rhuberg?

A. First I had a homestead cabin. I brought my wife out. I left her a few days in Moro, but in Moro—she was not able to speak English, and there wasn't a person she could speak to. I tried to fix up my house, but after a week I went down, and she told me she want to go back with me. After she seen my cabin, she feel discouraged, and cried. But I improved it a little, but she never got satisfied there.

Q. Had she ever lived on a ranch at any time?

A. No. My wife, she came out of same city where I am born. Her people lived close to my folks. Now, in them years that I was farming there, you see, we lived most of the time alone. Sometimes she was visiting the neighbors for a couple of hours. But all the time it was her craving [79] to go back to Germany. And I had not there very good show to branch out. There was no show for me to buy some other land that I could get a bigger place. Then in 1901 my father died. Then my brother, my youngest

(Testimony of Julius Rhuberg.)

brother, he got the business, and run the business up to 1903. Then he died. Then came letters from my mother. She didn't know what to do. She had trouble. And she asked me I shall come home. And my wife desired it. It was against my will. I like that free life in Eastern Oregon; I got used to it. When I came back to Germany I was short time there, I knew that I made a mistake, but I tried to please more my old mother. Then I came to Germany, I stayed a year, and it pretty near took me to straighten it out, our business, a little way. And I was compelled to take a place, for my relation had quite a little money in it, in Holstein. I took that place and farmed it. That was altogether different farming as we have in Eastern Oregon. I didn't understand it very well. And as soon as I can get out of it, that I satisfy my relation—it was the widows from my brothers; I had one brother, who was in Russia, he died; his wife was American lady—she was born in St. Louis; and it all depended on me—it all came to me that I had to straighten out this whole estate from my father. But in 1909 I got sick.

Q. When?

A. In 1909 I got sick. So I was glad that I can sell the place now, and even I made a little profit on it, and satisfied my relation. For I like this rough life—one day [80] in sheep camp—out every winter; we camped out every winter. I was full of rheumatisms. So we moved to Hamburg

(Testimony of Julius Rhuberg.)
after I sold that place. I lay for three months in bed.

Q. What was the matter?

A. Rheumatisms; nervous condition. So by degrees I got a little better. But I always talked to my wife "Oregon—Oregon." I thought when I come back to Oregon I will get well again. Then came 1911. 1912 I growed a little better; I was able to walk on a stick. And my relation getting sore on my wife that she was satisfied that I can go, and she could not go along with me then, our affairs was not settled yet. We had some money in houses, or some money out in that farm I had. I could not draw the money out right away. So I just took traveling money, and come here. When I came back, for my health I went to Ashland, then came back here to my old home. And from that time, or right away, my old friend he begin talking to me what kind of place would be the best for me to buy. So I wrote to my wife. I had dear friend staying—I met him here in Portland. He was going to sell me a place. He knowed my circumstances. I told him, I say, "You know I don't have much money, but all the same, if you will sell me the place," I thought I would be able; and here in Portland I sent dispatch to my wife in Hamburg to send me money. I sent it off from here. And then, after all, that land I did not want. It was in Klickitat County, and I was not acquainted there; and the place was in such a shape that I did not like to take it. So I dropped it for awhile. [81] Then

(Testimony of Julius Rhuberg.)

I came here to Sherman County, and we always try to find a place for me. And I again now write to my wife. Then she was a little afraid. She wrote me, "You wasn't hardly able to walk, and now you want to tackle a farm again." But I told her in letters to those letters "It is time." Then the war interfered. Sometimes I write her, she didn't get my letter. Then I get a letter again. She didn't answer my questions. So I thought better wait till the war—till all this trouble is settled. Now, I have a nephew—he is a prisoner of war in England, and he wrote me occasionally a letter from England, and he told me he like—he is a farmer—he would like to come out here and farm with me. So is it my wish, is it my will, to stay here in Oregon and farm again. That is to say, that I like to go, after this war, go over right away to Germany, if I have to go, to settle it, if my wife don't can straighten it out, I have to go; but if she can, I like to save the family money, when even I go there to Europe. But I don't know how that will come out. Men tried to make out of me a disloyal citizen. When I took out my papers, I thought I was American. On every occasion, I believe I showed I was American. When I was these years in Germany, I never felt as German. I came there—had to buy the place in Holstein. I was not used to them ways back there. You know some people that certain men don't like to live along. I been brought up, my father told me to do my duty under all [82] circumstances; if I like it or don't, for to do my duty. As I took out my

(Testimony of Julius Rhuberg.)

papers, I know what I have to do; and I believe I did it to the best that I could. I have worked long years. And you men maybe don't know what it means to go in the mountains or stay in the winter-time out with the sheep. I stay out with blizzard, with worst weather, I stay with my stock, and safely keep them for my employer. As I did my duty to my employer, so I says I do my duty to this country.

Q. What do you mean, Rhuberg, by "packing" when you speak of working in the sheep?

A. A band of sheep, it belongs to two men, one man the herder, and the packer, as must have two pack-houses and a saddle horse. In years before, you see, packer in the mountains he had to rustle the range. I went up most of them years into the Blue Mountains, and went up as far as to the snow mountains. I took sheep up there one year two bands—I had management of the whole layout. Other years one band. And I came out of that. I respect other people's rights; but I want them to respect my rights, too. I never lost anything. I never had any trouble up there, what a man had, get sheep killed by herders and had shooting scraps; I got out of it. And just the same as I went to farmers, and brought out good stock in the fall. If I didn't be married, maybe I stay with Mr. Hinton my life.

Q. You say you went broke in 1893?

A. 1893. That winter I had sheep for Mr. Seecamp. I sold enough of them lambs for a dollar—you know what [83] that means, when there was

(Testimony of Julius Rhuberg.)

worth a dollar—after I covered all my debts what I had to pay, it was not very much left. So I was discouraged to start in again, and I went over to Wasco County to a man that know me, and know what kind of reputation I have as a working man, and he give me a job.

Q. Now, when you first came over to this country from Germany, did you bring any money with you?

A. Yes. My father paid all the expenses. As soon as I got here, he sent me $500.

Q. When you came back from Germany with your wife in the spring of 1900—

A. 1900 I came home, and my father, after all, he begin talk a trip like that must cost me quite a little money, and when I get ready to start over here again, he went up to Hamburg, and he went to bank, and give me draft for $1000 to pay my traveling expenses. That draft I cashed in Moro.

Q. Had you sold your homestead before you went back and got married?

A. No. I sold my homestead in 1904. When I went back and get my wife, 1900; 1900 I get married, in March.

Q. When you went back in 1899, did you expect to remain there, or to return to this country?

A. No, I left everything here. I left my farm here. I left all what I had here; just took along what I needed to pay my trip.

Q. Now, when you went back in 1904, did you sell your homestead at that time? [84]

(Testimony of Julius Rhuberg.)

A. Yes, sir, I sold it in 1904. For all what I got, with my implements, I got $2,000.

Q. For your land and your implements?

A. From my land and my implements what I had.

Q. How much had you put into the place?

A. Just as much as I got out of it. You see, you fence it—posts are high.

COURT.—I don't think you need go into that.

Mr. JOHNSON.—The Government has made a point of it, your Honor, both in this case and the former case.

Mr. GOLDSTEIN.—There is nothing in the evidence at all of it, in the Government's case, that there is any issue raised at all on that point. I don't know what the purpose of it is. I didn't want to interrupt the gentleman.

Mr. JOHNSON.—If your Honor please, counsel for the Government in his opening statement made the statement that this man had come over here, and taken land from the Government, and taken citizenship,—

COURT.—He has already said that farm cost him more than he got out of it. What is the use of going into the detail of what he put onto his farm, or what he took off, and all that?

Mr. JOHNSON.—I just wanted to show where this $20,000 came from that counsel spoke of in his opening statement.

Q. Did you have any children? A. No.

Q. You and your wife, by your marriage?

A. No.

(Testimony of Julius Rhuberg.)

Q. How far was your farm, your homestead there, from [85] your nearest neighbor?

A. From my nearest neighbor, it was maybe three-quarters of a mile.

Q. And how far to the next nearest place?

A. That was the one place where woman was; another place was bachelor, maybe the same distance he was there. Most of the time he was gone. Then two miles away, I think was a place, three miles away.

Q. And what was the attitude of your wife during the four years that you were living up there on the homestead?

A. My wife, she know very well that she made it hard for me; she made it hard for me. She know I like Oregon; I like farm life. And all the same, many times I catch her when she was crying; and she told me one day, "Shall I never see my folks again?" That weakened my heart. I could not keep her there.

Q. What was she crying about?

A. That she was so alone; she didn't like to stay on the place. Afterwards now she feels different. We are growing both older, and she thinks now, in the letters I got from her, that she thinks it is now her duty, in one way, to stay with me. I gave her her way; now, she says, the rest of my years what I have to live she will give me my way; and she is willing to come out.

Q. At the time you went back with her in 1904, what was your intention as to remaining in Germany

(Testimony of Julius Rhuberg.)
or returning to the United States?

A. My intention was—I was 40 days there, I know I was out of place. [86]

Q. 14 days where?

A. In Germany; I was again in my own country, everything was strange to me. But as long as I lived as private citizen, as long as I had nothing to do but just attend to my mother's business, certainly it was some business, I was content; I could not do otherwise. But as I went on this farm, as I told you, when I had come in contact with them Prussian officers, how they meddle in everything! It was a pretty place. In one way I liked that place. But they notoriously meddle into everything. That I didn't like.

Q. Why was it, then, Rhuberg, that your return to America was deferred until 1913?

A. I sold that place as soon as I had a good show to sell it. I could not afford to sell at a loss. And, as I told you, I got sick in 1909, and I came here, I was an invalid. If I get well earlier, I be here earlier.

Q. When you returned in 1913, did you go direct to Sherman County?

A. No, I stayed while in Roseburg, close to Roseburg—10 miles from Roseberg—by a friend. But I came up here right away, and visited in my old neighbors; stayed 14 days, and then went back to Roseburg, and stayed awhile in Ashland that winter. I was invalid; it was a hard winter for me. My eyesight failed, that I could not read. I had to walk

(Testimony of Julius Rhuberg.)

always on a cane, and in reality I gained my health again in Eastern Oregon, and was able to do some work. And when I stay out there on the Mackin ranch for months I saw nobody else, just them people what belonged there. And sometimes I even stayed all alone; did the work that had [87] to be done there. And it ain't my way to go around and speak with neighbors, or visit them. I go very seldom to the town, except I had to go, when nobody was there, to get the mail; else mostly the boys brung the mail out. In the fall I had to haul the wheat. When I was several days to other house. I hauled wheat the last two seasons.

Q. Well, Rhuberg, what was your condition at the time you landed in America, at New York, in 1913—physical condition?

A. I wasn't very good. My folks, my relation, they was sore at my wife to let me go in that condition; but I would not wait any longer. I waited as soon as I know it was a little pleasant to travel, but I left in the early part of April. When I came to New York, I remember that I could hardly cross the street, that policeman was watching me, he came up to me and helped me to cross the street. I stayed in Hoboken—just went over to New York on one occasion, to get my railroad ticket.

Q. How many times since you went back to Sherman County have you been out of the county?

A. I wasn't out of Sherman County since I came there till the 3d of January, as I get arrested on this case.

(Testimony of Julius Rhuberg.)

Q. That was January of what year?

A. This year, 1918.

Q. And from 1913 to 1918 you hadn't been out of Sherman County?

A. I was not out of Sherman County. I came here—1913 I came here, on the 12th day of May, to Roseberg—I traveled [88] slow. I stayed a few days. The 12th day of May I was in Roseburg. Then I stayed in Roseburg two months, and I came up and visited my friends here in Sherman County, and went back to Roseburg, and stayed in Ashland that winter. Next spring, in 1914, I came from Roseburg up to Sherman County, and never left Sherman County till now, in January, I came down here for a week here, I got arrested.

Q. Now, at the time you left Germany in 1913, did you know anything about any impending trouble, or war, between that nation and any other?

A. I walked as invalid—we walked on a park—I didn't hear no war talk, hardly at all; sometimes maybe in the paper, but I couldn't read myself. I had to get my wife or somebody to read newspaper to me. In one day I heard war talk. It was in the last winter I stayed in Germany. My wife came home one day, and she told me there is an officer who reads English lectures, and I ought to go and listen to it. So I went to this lecture. It was one of these Carnegie officers, and he spoke about famous men. It was in a big hall. It was maybe over a thousand people listened to it. I wondered myself that it was that much English-speaking people that

(Testimony of Julius Rhuberg.)

could understand it, in Hamburg. There is lots of them. Then I heard the last lecture he give. That was the last lecture he spoke about Cecil Rhodes, and then he told the people of Hamburg good-bye. And then it is he said there was some men out in the desert—I never forget what that man said. This was before this war started. There was some men out in the [89] desert, and from away off he saw something awful, and as he came there he saw it was a man, and as he came up then he saw it was his brother. And this man say then it will be a crime against civilization if war between England and Germany, that first early. But I heard it was about the war between England and Germany. Then I heard no talk about it there.

Q. Mr. Rhuberg, when you came back to the United States in 1913, what did you bring with you in the way of personal effects?

A. I brought two big boxes, commode, with all my clothes in, and I brought the bed along, and I brought along for our household some silverware.

Q. What kind of bed?

A. I brought a feather bed along.

Q. Well, why did you bring that stuff?

A. Why, I wanted to use it.

Q. Did you have any intention of returning to Germany when you came over in 1913?

A. No, I had no intention. As I told yesterday, it was my friends know that I was talking about trying to buy land there again.

Q. Now, what character of work were you doing

(Testimony of Julius Rhuberg.)
up on the Mackin ranch and on the Von Borstel place?

A. I did all the work what I was able to do. [90]

Q. What kind of work was it?

A. I made the chores; I made wood; and after I got in better condition, I helped in the harvest; helped in seeding. For the first year, for the first two years, I just drove the neck team in harvest, but last year I was able to do stacking again; and after that I was able to haul wheat, maybe a month or six weeks. This spring I haul wheat over from the home place to the Mackin land for seeding purposes.

Q. Did you hear any of the testimony of Mr. Davis concerning some flags and a picture of the Kaiser, that he saw in the house on the Mackin ranch some time last fall or summer?

A. Yes, I heard that.

Q. Those flags that he spoke of, would you be able to identify them if you saw them? A. Yes.

Q. Will you examine these?

A. Yes, I know them.

Q. Various flags and pennants, and state to the jury whether or not these are the flags that were spoken of in the testimony of Mr. Davis?

A. Yes, they are.

Q. And were all of these flags on the wall of the room he referred to in his testimony?

A. I believe there even was more. I don't know. In the first year I was there, I know the boys brought some cigarettes.

Mr. GOLDSTEIN.—What did you say? Did you

(Testimony of Julius Rhuberg.)

say you didn't know? **[91]**

A. No, I said there maybe was some more there.

Q. Were these all there?

A. Yes, they was there. You see, the first year I was over at the Mackin ranch, I remember the boys bought these kind of cigarettes, or where they got them I can't tell. And the girls, they put them on the wall, or the boys maybe did it, for all I know. I had nothing to do with them flags. In the wintertime, spare time, the boy make models of ships, and he put the American flags on it. That is kind of bachelor layout there on the Mackin ranch.

Q. Are any of these flags your flags?

A. No, none of them are mine.

Q. Did you put any of them on the walls?

A. No, sir.

Q. Did you have anything to do with the arrangement of the flags around the house?

A. No. The girls, they clean up that house when they come over there occasionally.

Q. What girls?

A. Mr. Von Borstel's; been small girls; the oldest is now 18. But when she put up the flag, I believe she was 14 or 15.

Q. That German flag there among the others, did you have anything to do with putting that up on the wall of the house there?

A. No. You see they have been all the same kind what come in cigarettes with packages.

Q. Do you smoke cigarettes? A. I do not.

Q. Did you, or have you in the last three or four

(Testimony of Julius Rhuberg.)

years? A. Smoke cigarettes? [92]

Q. Yes. A. No, I never smoked cigarettes.

Q. Or buy them?

A. I never bought a cigarette. The boys maybe offered me one, and I smoke them, but I didn't like it. I maybe didn't smoke half a dozen in my whole life.

Q. What is the fact as to whether or not the German flag in the house there was put above the American flags around the same room?

A. That German flag was on the wall, and this models of them ships, they was on the desk, and it maybe just happened that it put them down below, where the desk was standing. Nobody, I think, thought anything about it.

Q. Were there any American flags on the walls of that room? A. Yes.

Q. That were still higher than the German flag?

A. Yes, there was same kind, there was American flag between it, and there was high up over a door.

Q. Now, what about this picture of the Kaiser that has been spoken of? Where did that come from, and whose was it?

A. I left my wife to put in my commode some pictures from my relation, picture from the house at Pinneberg, was pictures, and picture from the Kaiser she put in there. She was satisfied, I believe, in her own mind that some day she had to follow me; and so she give me along all what was possible, when I can get over on my ticket. I brought along some curtains already, some portierres, that

(Testimony of Julius Rhuberg.)

she put around the commode, and put [93] in big boxes. I brought two big boxes along.

Q. Well, where did this picture come from, and whom did it belong to?

A. You see, my wife had it. I don't know where she got it, if she bought it or somebody make a present to her of it; I cannot tell.

Q. Who put it up there at the Mackin ranch?

A. It was in the room; it was kind of bachelor house. I believe the girls did it.

Q. Did you hang it up?

A. No. No, I never bothered with decorating that house there.

Q. Did you take it down?

A. I took it down; in January, when I got arrested; I never thought of the picture—never looked on the picture hardly. You see that is the room, mostly we stayed in the kitchen, and sleep upstairs, and we have no fire there in the winter time, so hardly ever anybody entered that room; and I paid no attention to it until I found it out when I came home. They talked about a picture. Then I thought I better take it down. As soon as I came back to the Mackin ranch I took it down and put it away. But then I don't see no harm in it. Last week ago I read in the paper, Friday evening, in the "Evening Telegram," they just took those pictures down here in the public school where they had before had.

Q. What school was it, do you remember, that they took the pictures down here last week?

(Testimony of Julius Rhuberg.)

A. I don't know. I just read it in the "Evening Telegram." [94]

Q. Rhuberg, when did you first meet Corliss Andrews, and where?

A. I met Corliss Andrews the first time at the Mackin ranch. I know Frank Von Borstel brought him down there to me.

Q. Where had Andrews been living prior to that time, do you know?

A. No, I don't know. All what I know, he stayed before that—he had no work, he stayed at a hotel, and the hotelkeeper wouldn't keep him any longer. All I know from the boys what he owed, it was debts. So we took him for pity's sake. I had him there, I believe, nearly two months. I did the cooking. First he didn't was quite satisfied with my cooking, but after a while he get satisfied with it. And he acted as pretty good boy. He most company with that youngest boy from Von Borstel, Amandus. I hardy saw him except at meal times, or evening; in the evening, when we played cards. I don't remember talking wiht that boy any serious things. He was too much of a boy them days.

Q. He stated that the first time he met you was at the home ranch of the Von Borstels. Is that correct?

A. No, he didn't. That whole fall I was hardly over to the home ranch. He was at the home ranch, I know, but I wasn't.

Q. The time he stayed with you down there a couple of months at the Mackin ranch, did you ever

(Testimony of Julius Rhuberg.)

discuss with him the submarine policy of the German Government?

A. I believe not. I hardly think so. You see, them [95] boys—there was snow on the ground—there wasn't a day mostly but after they did the chores they went out hunting, and in the evening we played cards, or made nonsense. I had my time to quiet them down occasionally. They just act like two boys; neglect their work and went out playing. I don't can remember that I talked such with him.

Q. Did you hear him testify to conversations which he claims to have had with you in the home of the Von Borstels, the home ranch, in October or November of last year?

A. I seen Corliss after he left there at the Mackin ranch. I didn't see him for quite a while. I was very seldom going to Kent. And during wheat-hauling time I seen him a few times, and all he talked about then was about his girl; he like to get that girl. He asked me several times if I didn't know somebody wanted to loan him a thousand dollars that he can go ranching—rent land and get outfit. And I told Corliss, "You do the same way like I did. Go over to the other side of the country and herd sheep for a while, and you will earn one thousand dollars, and you don't need to borrow it." And I all the time considered him pretty good boy, when I saw he was trying to get his girl and I knowed the parents of the girl was against him; they didn't want it. So one day I encouraged him a little. I say to him, "Some day the old man will give in.

(Testimony of Julius Rhuberg.)

A year ago you went with that girl." I told him one day, "You are pretty smart fellow trying to get money that way as easy as working [96] for it." And I met him in the last year. Once he came over there to get a bull for his employer. I helped him. He was there at dinner-time, at the dinner-table, we have him some dinner, he and another man. Then Mr. Von Borstel was there, and the boys, and I herd them the bull out to the field; and we had trouble with that bull. I don't believe we talked anything about war, or anything. Then I know that remark from them boys, their talk. Not that he just told it to me, but as I know that boy. I met him again in the wheat-hauling time. He jumped on my wagon, and drove along with me a little ways, and then jumped off. I know he was afraid, or he didn't like to go to the army, and in some way, to console him, to make him feel a little better, I told him these words: "If the Germans should take you as prisoner, then tell them 'Send me' to your new German relations you have over there." I know I read it in the paper, I know some Germans get letters over there that they work their prisoners on a farm. "In that way you maybe have easier time." And that is all what I told Corliss Andrews. I met him then again twice. We was hauling wheat. In the evening he passed through there, as he said, he wanted to see the boys. I believe one time the boys wasn't there. He came in just for supper, and the people gave him supper. He stayed there a little while, talked around, and went on again. Last time he was there,

(Testimony of Julius Rhuberg.)

the second time, I was sitting and reading the paper, and he knowed me pretty well, when I all the time mean it good with that boy. So he tried [97] to monkey with me. He got me on my foot, when I told him, I says, "Corliss, you better go home and play with your woman, and leave me alone." That was the conversation. And from that time I didn't see him again. I met him once after this, after I got arrested, on the road. My eyesight ain't very good. He tried to stop and talk with me, or be friendly, but I just rode on. I said, a man can tell such stuff against me as he did, while I treated him always good, I don't know what to make of it.

Q. Did you, on either of those occasions when Corliss Andrews came to the Von Borstel ranch and talked with you, or at any other time, tell him that the moneyed men had caused the United States to enter the war against Germany, or words to that effect?

A. No, sir; no, sir. I never will told such foolishness.

Mr. HANEY.—Just a moment. The previous question asked by counsel was, Did you hear Mr. Andrews make a certain statement on the witness-stand? By actual count, the witness took 14 minutes to tell the whole story of his life with Corliss Andrews. Now he is asked the question, Did you make a certain statement to Corliss Andrews? I don't object to his answering yes or no, but I object to his going further into another 14 minutes' argument to the jury. I want to be fair about it, but

(Testimony of Julius Rhuberg.)

it does seem to me we will never get done with this case unless he is held down to answers to the questions. He says, No, he didn't made the statement. Now, I object to any further explanation.

COURT.—He has a right to make such explanation as [98] he desires to make the answer clear. But I don't think that you ought to argue the case to the jury. Simply tell the facts, and let it stop there.

Mr. HANEY.—Your Honor, may I be heard just a moment? What more facts could there be, when he says, "No, I didn't make the statement"? The question was, Did you make the statement to Corliss? He says, no.

COURT.—He says no; but there might be some explanation about it.

Mr. JOHNSON.—As to this 14 minutes, this defendant is confronted with a possibility of 60 years in the penitentiary.

Mr. GOLDSTEIN.—There is no necessity of that. I realize that it should be serious. The Court has already passed upon the objection of counsel. It is unnecessary to go in and explain the reason why you want him to say something that is absolutely immaterial, simply because it is a serious case. All cases are serious. There is no necessity of bringing before the jury matter that has no right to come before the jury.

COURT.—The term of sentence is not a matter for the jury. You may proceed with the testimony.

Q. Answer the question. Have you answered?

(Testimony of Julius Rhuberg.)

A. Yes.

Q. Did you, on those occasions or at any other time, state to Andrews that Germany was in the right and the United States was in the wrong in this war, and that you hoped that Germany would win, and that Germany was sure to win, or words to that effect? [99]

A. No. What that I heard—he didn't tell me that—but Corliss Andrews, that was the talk around there, asked last spring—

Mr. HANEY.—I object to this witness stating what the talk was.

COURT.—State to the jury what Andrews said to you, if anything. I understand you to say you didn't make that statement?

A. I didn't sir, say it.

COURT.—Well, that is an answer to the question.

Q. Now, is there any explanation you want to make of your answer?

A. Yes, I will tell it to you.

Q. What is it?

A. Now, what I heard is this.

Mr. HANEY.—What this witness heard in the neighborhood generally—he is asked about a conversation between himself and Corliss Andrews. I don't mind him explaining what he said or how he said it, but I object to him going into what was said to him.

COURT.—Did you have any talk of that kind?

A. No; no.

COURT.—That answers the question. I don't

(Testimony of Julius Rhuberg.)

see what further explanation is needed.

Q. Did you have any conversation with Andrews along the line of that statement, or anything connected with it? A. No.

Q. Did you ever say to Andrews on those occasions, or any other occasion, that one German could lick ten Americans? [100]

A. Such foolishness—such child talk—I believe a man of my years would not make such talk. No, I did not.

COURT.—Answer the question.

A. No.

Q. Did you ever state to Andrews on those occasions, or at any other time, that the United States was so slow that Germany would have it whipped before we got ready for war, or words to that effect?

A. No.

Q. Did you ever state to Andrews on those occasions, or at any other time, that the United States had no business in the war? A. I did not.

Q. That it ought not to have gone into it, or words to that effect?

A. I don't talk with that boy that way.

Q. I didn't hear your answer. A. No.

Q. Now, did you hear the testimony of Luther Davis? A. Yes.

Q. On the stand in this case. How long have you known Davis?

A. I seen him first as he was working for a neighbor, for Mr. Schassen. I went over there the first year I came back, and I seen him several times;

(Testimony of Julius Rhuberg.)

maybe meet him on the road, or there at Schassen's two or three times. Then I get acquainted better with him. A year or so ago he got married. He married his employer's daughter. And he moved on a place he rented, that lays half way between the Mackin ranch and Kent. And his wife was away much, [101] and she didn't make up with the people. So to console that woman—lived there alone, and I knowed her as a little girl—I took pity on her; sometimes they came down to the Mackin ranch—we raised pretty good garden there; give them some vegetables. And if on occasion I went to Kent, any that woman saw me, sometimes they watched me when I was riding past, when I came back she called me in for dinner. And this spring, when I was hauling wheat, in April, they came out and asked me to stop for dinner; and I told them I had no time—they were waiting for the wheat. And after the first—I don't know what occasion—I was down in the evening, I came to Kent, and Luther Davis came up to me, and offered—he want to bring me out to the home ranch. He was always friendly to me.

Q. Did you ever go to their house when you were not invited?

A. No. I never went to the house, except on two occasions when I passed through there, and last fall once he got seed wheat from Von Borstels, and he didn't need it all, and I went there to get that wheat again. I hauled that 25 sacks of wheat. Just at dinner-time he was coming out of the field, and he

(Testimony of Julius Rhuberg.)

told me, "Julius," he says, "you go in and get your dinner." He is young man—he can handle sacks better than I. "I will make load it on." I went into the house and spoke to Mrs. Davis. Then Mrs. Davis—she knows my wife—she asked me if I heard from my wife, and I told her no. That is over a year ago that I got the last card. A letter I didn't get for a year. I don't know how my wife getting [102] along there. That is what I told to Mrs. Davis.

Q. Do you know the man William Mitchell who testified in this case for the Government?

A. When I seen it the indictment, I didn't know who this man Mitchell was. Then I asked them boys, "Do I know Mr. Mitchell? I believe I never seen him." But then the boys inquired, and they told me, "Yes, you seen him all right enough." And now, then, I remember it was last spring, I was hauling rock from the ground and depositing it alongside of the fence; across the road was a man plowing with six-horse team, and he seen me unloading them rocks there, and he hallooed to me if I had water; and I told him, yes. So that man came across the road through them two fences, and I give him a drink, and I asked him to help me load on some heavy rock, and he helped me. And the next day he came over again—he was plowing there still; but he don't leave his team standing very long; just was coming over, get a drink, and say a few words. And then, as he testified, I maybe said that if it had been in Germany we had beer in the jug instead of water.

(Testimony of Julius Rhuberg.)

That is afterwards I never seen Mr. Mitchell again, and before I never seen him. He maybe seen me on the street. But I ain't acquainted with the man, and I paid no attention to it.

Q. Did you ever say to William Mitchell and Luther Davis, or to either of them, that the moneyed men had caused the United States to enter the war against Germany?

A. I never seen them both together. That is the only time I seen Mitchell. [103]

Q. Did you ever make that statement to either of them on any other occasion? A. No.

Q. When you might have seen them separately?

A. That is the only time I seen Mr. Mitchell, as I just stated now.

Q. I say, did you ever make that statement at any time, to either one of them, when you might have seen them separately? A. No.

Q. Or did you ever state to either one of them that Germany was in the right and the United States was in the wrong? A. No.

Q. And that you hoped Germany would win, and that Germany was sure to win? A. No.

Q. Or words to that effect? A. No.

Q. Or ever tell them, or either of them, that the best thing the enlisted men and men of registration age could do when they got in battle would be to throw up their hands and let the Germans take them prisoners, or words to that effect? A. No, sir.

Q. Did you ever tell either of them, on any occasion, that one German would lick ten Americans, or

(Testimony of Julius Rhuberg.)

words to that effect? A. No; no.

Q. Did you ever tell either of them, on any occasion, [104] that the United States was so slow that Germany would have it whipped before the United States got ready for war? A. No.

Q. Did you ever tell them, or either of them, that the United States had no business in the war, should not have gone into it, or words to that effect?

A. No, sir.

Q. How long was Mitchell over there at the time you talked with him last spring?

A. He could not be very long over there; maybe the longest I think he can be there five minutes. A man cannot leave his team standing long—his six-horse team.

Q. Did you hear the testimony of Mr. Davis that you had stated to him that you had fought in the Franco--Prussian war? A. Yes, I heard that.

Q. Is that true? A. I was nine years old.

Mr. GOLDSTEIN.—Answer the question.

A. No.

Q. Did you ever say to him that you had fought in that war? A. No.

Q. Did you ever tell Luther Davis, or any other person, that Liberty bonds would soon be selling at 25 cents on the dollar, or words to that effect?

A. No, sir.

Q. Did you have any talk with Davis about Liberty bonds at any time?

A. I hardly believe—I will say no. [105]

Q. Did you ever tell Davis of any experiences your

(Testimony of Julius Rhuberg.)

family had had in connection with the German war bonds?

A. I don't believe, sir, that I did. Then I think he is too ignorant to understand it.

Q. Did you hear the testimony of Sproul?

A. Yes.

Q. Who was on the stand yesterday as a witness for the Government? A. Yes, sir.

Q. How long have you known Sproul, and where and when did you first meet him?

A. I seen Sproul once last fall. We was working on the fence. I was driving team, I sitting on the wagon. Then Sproul came along in the buggy. He speak to them boys, and talk to them boys, first about hay or straw. I know nothing about that. And then they was speaking there—I know the mostly talk was that long years bartender, and that he had some kind of disease, venereal, and after that how he say that man, what I heard, or what the boys I believe what said, it was a rich man's war. He had reputation there to be a socialist. And all that he said, the only good word what I heard out of that man's mouth about his country was that American sailors or American Navy was good shots. And then I said, that is only what I said, I says, "Shooting goes as far as it goes." I read in the Scientific American, about in the Spanish war that after this investigation, it was in this naval fight, I read in the Scientific American that in the battle of San Juan, Cuba, after the battle was over, and the investiga-

(Testimony of Julius Rhuberg.)

tion of the Spanish works, **[106]** it was just three per cent hits.

Q. Did you have any other talk with him about war subjects? A. No.

Q. Did you get off the wagon at that time?

A. No.

Q. Were you doing the talking?

A. I was holding a little ways back. He did the talking to them boys mostly, not to me. And drove up a little further, and I maybe went on the wagon took hold of some posts. I don't remember exactly that any more, but I don't believe that I left the wagon. I have to guarantee—I have to take care of my horses.

Q. Did he get out of his buggy—Sproul?

A. I don't believe.

Q. How long was he there, Rhuberg?

A. Oh, he maybe stopped 15 minutes.

Q. Was that the only time you ever saw him?

A. That is the only time I ever saw Sproul.

Q. Now, what about this talk with the preacher? Tell the jury what occurred that time.

A. Last spring he came down to the Mackin ranch with Mr. Bourhill, the banker. And this Mr. Bourhill, he had some business, as I found out afterwards, and so he went up to the house to talk to Mr. Borstel about that. And Mr. Bourhill left that preacher with me. I was just in the barn, cleaning the barn. That man came to me, Mr. Bourhill made me acquainted with him, and I went to my work, he followed me into the barn, and began to talk about

(Testimony of Julius Rhuberg.)

horses. And what I remember it struck me first, we have fine big [107] horses, and he said it was a nice stallion and it was a big overgrown mare. And I thought it was no use talking stock with such a man that knew nothing of it. But then at last it drifted to beer-drinking, and he said to me, how it happened that about beer-drinking that none of them Germans hold the record in athletic games; and I told him I think so if the men who have to go every year, or have to go three years into the army, after they come out of the army they don't like it any more, these athletic games. And I said, after all, it must be pretty strong men in this war they march 30 or 40 miles a day. I told him them facts, when I was in the army every evening pretty near the year around we have beer soup. I told him my brother, my only brother who is living, he is minister in Holstein, in my native state, and that he had no objection against beer-drinking. And when he said about the Red Cross, and I maybe said that, I said we have no wounded yet, and I don't know much about the Red Cross do yet, the soldiers over in France, and we had nothing—I don't know what I said.

Q. Did you at that time or at any time, in talking with the preacher or with any other person, justify or attempt to justify the sinking of the Lusitania?

A. No, sir.

Q. Have you ever, at any time, done so?

A. No, never would say such thing. In our talk, the boys maybe listened, if I talk to responsible man

(Testimony of Julius Rhuberg.)

what understand it, as I know international law, and we did it in the Civil War, contraband ships certainly the enemy had [108] a right to sink it; but a ship with passengers, that is wrong. If I read it —even I am born, as you gentlemen knows, in Holstein, and brought up as a German, when I read it in the papers it hurt me that they do it.

Q. Have you at any time, in talking with any one, justified the sinking of ships carrying contraband, without first making the search and seizure required by international law? A. No, sir.

Q. And the removal of the crew to a place of safety? A. No.

Q. Counsel for the Government has stated that you are a man of some means, worth probably $20,000. What is the fact as to that, Rhuberg?

A. I inherited quite a little money from my father; some I saved myself. Now that money is invested some way, as I told yesterday evening, in a farm what I had to pay for. I wrote my wife, she send me statement two years ago, and that statement I never get answer. I get other letter in which she told me that she sent me statement. At present how my financial standing is, I have no idea. I don't know if the Government get hold of it; if the German Governments didn't tackle it or monkey with it I have no idea at present.

Q. Of what money you have, what proportion of it did you inherit from your father, and what proportion did you make in this country?

A. I didn't make much money in this country. I

(Testimony of Julius Rhuberg.)

made money here, I lost it, as I told you, in that hard winter of 1888. Then I was four years here, but I saved and worked steady, [109] and that hard winter that let me out in debt; I had to straighten up the debts again. Then came 1893 and '94.

COURT.—It isn't necessary to go into that history. Just answer his question shortly.

Q. What proportion of that money did you make in this country, and what proportion came to you from your father? You can answer that shortly.

A. For my homestead I got $2,000, but my work I pretty near put in it, that is, this $2,000, which I went in 1904 over to Germany, and maybe took $2,500. With that money, German money which I got in exchange in New York, 10,000 marks, that is $2,500, that is what I took to Germany.

Q. Is that all of the money you took out of the United States? A. That is all.

Q. Where did any other money you have come from?

A. I had inherited quite a good deal, and then from that farm what I bought in Holstein I make after I sold, I made quite a little money on it. I paid there, when I bought the place, when I had to take it, I thought my relation put it a little hard on me, I had to take it for 1,000 marks, for $250 an acre; but land went up, and as I sold it I got 1,500 back, so I made quite a little money on it. And after I sold the place I invested some—I bought American railroad shares in Hamburg, in the bank you can

(Testimony of Julius Rhuberg.)

buy them. And I know I had Southern Pacific and Erie. I inherited some stock from my father. I know that was in Finland, and it was Brunswick, and it was [110] Italian papers; but what they are worth today I have no idea; and if my wife keep them today, I don't know either. I get no statement, as I told you.

Q. What railroad stocks did you buy while you were in Germany?

A. Erie and Southern Pacific; and sometimes I have Union, too, I don't know.

Q. Sometimes you had what?

A. Union Pacific. But I sold some again and bought some. That is all what I can do. I was in Hamburg, that I went to broker, and told him what cash money what was on hand I like to buy them papers for.

Mr. JOHNSON.—At this time, your Honor, I want to offer those flags in evidence.

COURT.—Very well. Is there any objection?

Mr. HANEY.—No objection.

Cross-examination.

Questions by Mr. HANEY:

Mr. Rhuberg, you say you were born in 1861?

A. Yes.

Q. You came to America in 1884? A. Yes.

Q. You returned to Germany in 1900?

A. I returned in 1899, December.

Q. Beginning of 1900? A. Yes.

Q. You returned herein a few months, sometime in 1901? A. No, in 1900 I returned.

(Testimony of Julius Rhuberg.)

Q. Then you returned to Germany in 1904?

A. Yes, sir.

Q. And you stayed there until 1913?

A. Yes, sir. [111]

Q. Then you came back to America, and have been in Sherman County practically ever since?

A. Yes. It was, as I said yesterday, first I stayed a few months in Roseburg, or close to Roseburg.

Q. What do you consider yourself worth at this time, Mr. Rhuberg?

A. I don't can say exactly.

Q. What did you testify on the former trial?

A. Yes, maybe around 20,000.

Q. You testified square up that you thought about $20,000, didn't you? A. Yes, sir.

Q. Of that $20,000, what portion of it is now in this country?

A. I say I took traveling money. I took $1,100 along.

Q. Please answer the question.

A. $1,100 I took out; but I spent at this time that.

Q. $19,000 of your $20,000 is in Germany now, isn't it? A. Yes, sir.

Q. That is right?

A. I tried hard to get money here.

Q. Did you tell Corliss Andrews that the moneyed men had caused the United States to enter the war against Germany? A. No.

Q. Did you ever tell Corliss Andrews that Germany was in the right and the United States was in the wrong, and that you hoped that Germany would

(Testimony of Julius Rhuberg.)

win? A. No. [112]

Q. And that Germany was sure to win? A. No.

Q. Did you ever tell Corliss Andrews that the best thing that a drafted man could do, if he got in a tight place, would be to throw up his hands and let the Germans take him prisoner? A. No, sir.

Q. Did you ever tell Corliss Andrews that one German could lick ten Americans? A. No.

Q. Did you ever tell Corliss Andrews that the United States was so slow that Germany would have this country whipped before we got ready for war?

A. No.

Q. Did you ever tell Corliss Andrews that the United States had no business in the war, and ought not to have gone into it? A. No, sir.

Q. Did you ever tell Corliss Andrews that Liberty bonds would soon sell for 25 cents on the dollar?

A. No, sir.

Q. Did you ever tell any one of those same statements to Luther Davis? A. No, sir.

Q. Or to Sproul? A. No.

Q. Or to Mitchell? A. No.

Q. Or to the Reverend Mr. Smith? A. No.

Q. Then, if all of these gentlemen say you did make these statements, they are telling an untruth, are they?

A. They don't tell the truth, sir. [113]

Q. Just answer me: Are they telling an untruth if they say you did?

A. They don't tell the truth.

Q. Did you have any discussion concerning any

(Testimony of Julius Rhuberg.)

one of those statements with Luther Davis in the presence of Luther Davis' wife?

A. No, I had not.

Q. If she says you did, then she is telling an untruth, is she? A. She must.

Q. Do you think all of these men have conspired against you? A. Yes, sir.

Q. What is the reason you think they have conspired against you?

A. That is a puzzle to me.

Q. It is what?

A. It is a puzzle to me. I don't understand it.

Q. You claim to be a good, loyal American citizen, do you? A. Yes, sir.

Q. You believe that, if any man did make these statements to drafted men, conscripts in the National United States Army, he would be guilty of treason, don't you? A. Yes, sir, sure.

Q. You think he would be a traitor to this country? A. Yes, sir.

Q. And you think he should be punished?

A. Yes, sure.

Q. Did you ever justify the sinking of the Lusitania [114] to any one of these men? A. No.

Q. Then if they say you did, they are mistaken about it? A. Yes, sir.

Q. You think that is additional evidence that there is a conspiracy against you? A. Sure.

Q. What support have you given the Government since it entered the war?

A. Sir, I told you just now I don't have much

(Testimony of Julius Rhuberg.)

money. I have to impose on my friend.

Q. I didn't ask you that. I asked you what support you had given this Government since it entered the war?

A. This Government, I bought $100 worth of bonds this last loan.

Q. When did you buy that?

A. This last loan.

Q. When?

A. About two or three weeks ago, it is now; three weeks ago.

Q. And at the former trial of this case is the first time you ever contributed anything to this Government? A. Yes, sir.

Q. Have you ever contributed anything to the Red Cross? A. No.

Q. Have you ever contributed anything to any of the Government projects for the support of our soldiers and sailors? A. No.

Q. You have been solicited to do so, haven't you?

A. I don't understand. [115]

Q. Yes, you do know whether you have or not?

A. No, I never have.

Q. You never have been solicited by anybody?

COURT.—I don't think he understands the word "solicited."

A. No.

Q. Has anybody ever asked you to contribute to any of these funds? A. No, sir; no.

Q. Did you ever have a discussion with the pastor, Mr. Smith, concerning the Red Cross?

(Testimony of Julius Rhuberg.)

A. Yes, just what I told.

Q. You heard his testimony? A. Yes, sir.

Q. You heard him say that you said you would not contribute to the American Red Cross?

A. I never said that.

Q. You deny that? A. I deny it.

Q. You heard his testimony that you said that you would contribute to the German Red Cross, because "We have wounded," referring to yourself?

A. I never. I saw no occasion, and I never did contribute anything to the German Red Cross.

Q. Did you tell Mr. Smith?

A. No, I don't think so, how that man can say that.

Q. You think he is another conspirator against you in this matter?

A. I don't know how he came to do it.

Q. You don't know how he came to do it?

A. No.

Q. But you know he is not telling the truth about it? [116] A. No; I didn't say that.

Q. You say those flags that were put up in your room were put up by the girls?

A. It wasn't my room where the flags was, in my room where I slept.

Q. It was in your house?

A. No, Mr. Von Borstel's house.

Q. It was in the house where you were living, wasn't it? A. Yes, sir.

Q. You say the girls put them up there?

A. Yes, they papered the wall and put them flags on there.

(Testimony of Julius Rhuberg.)

Q. Where are the girls that put those up?

A. Von Borstel's girls.

Q. Where are they now?

A. They been at home.

Q. The girls put up this picture of the Kaiser, too, did they?

A. Who did it I cannot say, but I believe she did.

Q. Where is the girl that put the picture of the Kaiser up?

A. I believe it was the oldest girl, but that is three or four years.

Q. Where is she now?

A. She is home; last three years.

Q. Where did she get the picture of the Kaiser to put up?

A. That picture, I emptied my boxes; you see all those pictures in she put, those pictures from my relations too. I got them out of the boxes and put them there.

Q. You put it up after you came back from Germany, or had it put up?

A. I didn't tell anybody to put it up. [117]

Q. You brought it back from Germany?

A. I brought it back from Germany.

Q. Why did you take it down?

A. Why I took it down?

Q. Why did you?

A. Why, I took it down, there was some objection, I heard, that maybe I was arrested with them people.

Q. When did you take it down?

A. When I came back, it was the 4th of January.

(Testimony of Julius Rhuberg.)

Q. After your arrest? A. Yes, sir.

Q. Before the United States Government entered the present war, what was your attitude toward the war then in progress between Germany and the allied nations? A. Between Germany and England?

Q. Between Germany and England?

A. My idea was that was with my people over there.

Q. Did you discuss that matter with people generally?

A. You see, I had very few occasion to speak to people. Certainly I talked to Mr. Von Borstel or some acquaintance came.

Q. Mr. Von Borstel is also German, isn't he?

A. Yes.

Q. A former German army man?

A. I didn't understand.

Q. Mr. Borstel is also a former German army man, is he not? A. Yes, sir.

Q. Served in the Franco-Prussian war?

A. Yes, sir.

Q. Now, who else did you discuss your views with?

A. Sometimes when I met, the first year, I seen some of [118] the German neighbors there, and some of them that was in the German army, some not, and we read the paper and we talked about that war. Now, Mr. Borstel and I talked as soldiers, a good deal in this same way as you maybe here have no idea how the army, how it is today. We talked a good deal about it as you will talk over a baseball game though you are not directly in it.

(Testimony of Julius Rhuberg.)

Q. Then you did discuss pretty generally your views, which were sympathetic with Germany as between Germany and the allied nations? A. Yes.

Q. Before we entered the war?

A. Before the United States went into the war.

Q. When did you quit talking that way?

A. You see, after United States went into the war, that was last spring, we mostly had our work. I met very few men during the summer, and we had no occasion to talk much war.

Q. Why did you quit when the United States went into the war? A. Why, I didn't quit just.

Q. You didn't?

A. No, when we talked together, we saw it in the newspapers.

Q. Why didn't you quit?

A. What we seen in newspapers United States had no troops over there, then I first spoke about America and Russia and Germany, all the time spoken of was the war going on in Russia, and occasionally we talk about it.

Q. Well, now, I don't understand yet: Did you quit talking [119] favorably to Germany after the United States went into the war?

A. Favorably—yes, we quit that.

Q. Why did you?

A. I hardly talk about it after the United States went into the war.

Q. Why did you quit talking about it when the United States went into the war?

A. We had no occasion—I had no occasion to talk

(Testimony of Julius Rhuberg.)

much. If you know the condition how they are there, you will understand it, that for days and days you don't meet a man.

Q. Well, is there any reason why you met less people after the United States went into the war than you did before the United States went into the war?

A. I am citizen of this country. After we went into the war with Germany—I have to-day a feeling for my relation or my people over there; but you know as German Government is nothing to me; it is nothing to me for 34 years.

Q. Is the American Government anything to you?

A. Sure.

Q. What are you doing for the American Government now?

A. Now all what I can, and that is just my work what I put in.

Q. Are you doing anything except advising American soldiers to quit and throw up their hands?

A. No, I don't do such things.

Q. You didn't do that? A. No.

Q. They say you did. A. I did not. [120]

Q. They say you advised them that we couldn't win; that Germany was right and that she ought to win. A. I didn't do that.

Q. That one German could whip ten Americans.

A. No.

Q. Is that your conception of supporting this country?

A. That is foolish talk, somethings like that.

(Testimony of Julius Rhuberg.)

Q. I think it is. I agree with you. How many times did you meet Mr. Mitchell?

A. That one occasion.

Q. Just one time?

A. One day, or next day, too; twice he came over there.

Q. Do you think he has any particular reason to come in here and perjure himself against you?

A. I don't know.

Q. You don't know of any? A. No.

Q. Do you think this boy Luther Davis would have cause to come in here and perjure himself?

A. I don't understand that, that man comes here and talks that way. I heard it on the former trial—I didn't know what to say.

Q. Do you think his wife would come and take the stand and commit perjury as to what you said?

A. His wife said last time she heard nothing, she know nothing about it; and this time she says so.

Q. She wasn't examined about that. You heard her testify that she heard the conversation between you and Luther Davis, didn't you?

A. On the former trial she said she heard nothing. [121]

Q. Do you think she perjured herself?

A. I don't know.

Q. You don't know. What reason do you think this preacher Smith would have for coming in here and stating the thing that he says he heard you say?

A. If that man let me alone there, why he comes to me and talk, that is the same, why he comes to me

(Testimony of Julius Rhuberg.)

and maybe twists my words around in my mouth and speak here different. Maybe he understand me wrong.

Q. Well, do you think it is anything wrong for an American citizen to talk to another American citizen about the Red Cross?

A. No; but then he just shall stay to the facts, and maybe not twist them around. Maybe he has something else in his mind, and he was maybe prejudiced against me on account of my German birth.

Q. Did he say he was? A. No, he didn't.

Q. Was there anything that led you to believe he was prejudiced against you?

A. Prejudiced against me a little when I talk prohibition with him.

Q. It was because you were anti-prohibitionist, and not because you were a German?

A. Yes, that I believe.

Q. You believe that justified him in his mind in coming in here and perjuring himself?

A. I don't can say that. I can't tell that.

Q. You don't believe it yourself, do you?

A. What?

Q. You don't believe he perjured himself, do you?

[122] A. No, I can't say.

Q. Sproul, you say, was a former saloonkeeper?

A. That is what he said, or bartender; that is what he told them boys.

Q. When did you commence to take umbrage at people for engaging in the saloon business?

A. I said nothing against them.

(Testimony of Julius Rhuberg.)

Q. You offered some criticism against him, didn't you? A. No, that ain't any criticism.

Q. What was the purpose of mentioning it?

A. I thought I heard yesterday that he said he never worked in a saloon.

Q. He did say so. Now, what reason do you think he had for making the statements against you? Is he prejudiced against you for anything you said?

A. No, that is the only time I seen that man. I don't see why in the world that man comes here and says some things against me. I don't understand that.

Q. You don't know of any reason why he should?

A. No. I never did that man any harm. I never knowed him. He comes there and speak there a few minutes on the road, and that is the only time I seen him in my life; and then he comes here and speak against me that way.

Q. Do you recall a statement that Mr. Sproul made concerning the invasion of Germany by American troops? A. No, I don't remember that.

Q. Do you remember what answer he says you made to him?

A. German troops invading Belgium?

Q. No. I ask you if you recall what he said to you about [123] the invasion of Germany by American troops. A. No, I heard nothing of it.

Q. You heard nothing about it? A. No.

Q. You don't recall having said anything to him in reply to that?

A. No. Most of the time I was the distance from

(Testimony of Julius Rhuberg.)

here as far as you are sitting away from him.

Q. Did you have any discussion with Luther Davis or Corliss Andrews about the purchase of Liberty Bonds? A. No.

Q. None whatever?

A. I believe we talked about it as I was hauling the wheat.

Q. Now, who talked about it?

A. Luther Davis and I.

Q. What was the conversation?

A. Now, you see, I know how Luther is fixed. You see he—

Q. I don't want that. I want to know what he said and what you said.

A. I don't can tell exactly. I don't know that any more.

Q. You don't know what you said nor what he said?

A. No. But I know that much, that I never will say that the papers will come down to 25. I know that, and that is nonsense.

Q. Did you tell Luther Davis that the rich people had caused this country to go into the war?

A. No.

Q. Did you tell that to Mrs. Luther Davis?

A. No.

Q. Did you tell Luther Davis that the Germans were justified in sinking the Lusitania? A. No.

Q. Did you ever have any discussion with him about the [124] Lusitania? A. No.

Q. None whatever; and none with his wife?

(Testimony of Julius Rhuberg.)

A. No.

Q. What? A. No, sir.

Q. Did you have any discussion with Luther and his wife concerning your return to Germany?

A. I told Mrs. Davis, as I didn't tell them all my private affairs, but while she asked about my wife, I told her when the war was over I will go, if I have to go, to Hamburg and get her; I want to see her again. I didn't see her now for over five years. And if she had courage enough to come to New York alone, I can save the traveling expenses. But if she don't, and if she don't can straighten up my business, I am compelled to go. But I just asked the banker Mr. Bourhill—I told him about it, which way was to get money. He inquired here by the banks in Portland, and they told him it was no show. I want to buy land.

Q. I am talking about the conversation between you and Luther Davis. I don't care anything about the conversation between you and the banker.

A. Yes.

Q. Did you tell Luther Davis or his wife you were about to return to Germany? A. Yes, sir.

Q. Did you tell them you were going next year?

A. I don't know. I told them as soon as it was possible.

Examination by the COURT.

Q. At the time this Government went to war with Germany on April 6, 1917, did you or did you not regret that this Government should take a hand in the war? [125]

(Testimony of Julius Rhuberg.)

A. Yes, your Honor. You see, certainly, I am born in Schlewig-Holstein, I hated to see that it had to come to it.

Q. You regretted, then that this Government should go to war with Germany, your own country?

A. You see, while it may be no way out of it—

Q. Answer the question.

A. And we have to do our duty, as we do our duty to this country, even if it was hard.

Q. Well, then, you regretted that this country should go to war with Germany? A. Yes, sir.

Q. Well, now, if you were called upon to-day to go to war yourself, which Government would you choose to fight for?

A. Surely my country; that is the United States.

Q. Your country, the United States?

A. When we had that Mexican trouble, you see, that boys—maybe it was for my part foolishness, but this American they say some things like that, then I told them I like to go along, even if I can do nothing else was to drive a team.

Q. Where was that—Mexico?

A. When we had that trouble with Mexico two or three years ago.

Q. Did you know what part Germany was taking in that Mexican trouble?

A. No. You see, then I told you my eyes are bad; I just have to take what they read me out of the newspapers; but what Germany had to do with it I had no idea. [126]

Q. You understand now that Germany has been

(Testimony of Julius Rhuberg.)

taking part in the Mexican trouble, don't you?

A. I read it in the papers, yes, some of it.

Q. Do you indorse that? A. No, surely not.

Cross-examination (Continued).

Q. Do you believe the story that Germany intervened in the Mexican trouble?

Objected to as not proper cross-examination.

Mr. HANEY.—I presume it is not proper cross-examination. If they insist, I will withdraw it.

Mr. SCHMITT.—You made us stay within the limits.

Mr. HANEY.—However, the witness has stated that he is loyal to this country. It seems to me that I might test him out on that, but I will withdraw the question.

Q. Have you ever discussed with any one the invasion of Belgium by Germany?

A. I don't remember.

Q. You don't remember? A. No, I can't tell.

Q. Well, during all of the months immediately—

A. Anyhow, not with these boys.

Q. Wasn't that question discussed by you?

A. You see, I didn't discuss it with them boys; surely not.

Q. Did you discuss it with anybody?

A. They don't know nothing of it. I hardly think they know where Belgium was before the war.

Q. Did you discuss it with anybody?

A. I maybe did that. [127]

Q. How do you feel about the question of the invasion of Belgium? Do you feel it was justified?

(Testimony of Julius Rhuberg.)

A. You see, it was a neutral country. It was the same way as Schleswig-Holstein. I know my father was opposed against Prussia in the war. It was the same way as they did in our country in 1864.

Q. Do you justify the invasion of Belgium?

A. No, I don't justify; even as they did not justify invading our home country.

Q. And you don't justify the sinking of the "Lusitania"? A. No.

Q. You think that was wrong? Do you believe the stories that civilians in Belgium have been impressed into practical slavery by Germany?

A. I am sure I don't know.

Q. How?

A. I don't know. I read nothing about that.

Q. You never read anything about that. How do you feel about the bombardment of unfortified towns? Do you feel it was justifiable?

A. No, it ain't; just fortified city is allowed by law.

Q. Then you think the bombarding of London and Paris was hardly justified?

A. As far as I know, Paris is fortress; London is open city.

Q. Well, having all these views, have you ever expressed to anybody at any time dissatisfaction with Germany's position?

A. Sir, these questions like this bombarding them cities, I think, as I told you, it is fortified place it is right, [128] if it is open city it is wrong, to my notion.

(Testimony of Julius Rhuberg.)

Q. That is not my question. I say, if you have all the views you indicate to me, and have had them, have you ever expressed to anybody a criticism of or dissatisfaction with Germany's position to anybody?

A. I don't believe it.

Q. You don't believe you ever have?

A. No, I don't believe so.

Q. Then, you must be very strongly impressed with that feeling?

A. You see, all of this war talk what we had there, what I had with responsible men out there, we talked about it, as I told you, as an outsider looking on a baseball game. That way we talked about that war before we was in the war.

Q. Before we got into the war?

A. As the war was between Germany and England and France.

Q. Did you feel the United States was neutral prior to the time she went into the war?

A. Sir, I have never formed an opinion over it. But you see, you read papers from both sides, you read the New York City side and you read the Oregonian, the one says so, the other say so; now, I ain't judge.

Q. You understood the United States was neutral prior to the declaration of war by our Congress and President? A. Surely she was neutral.

Q. Then, did you have any discussion with Luther Davis or Corliss Andrews concerning the shipping of food or ammunition to England? [129]

A. Sir, that is a question what I don't can decide.

(Testimony of Julius Rhuberg.)

Q. I didn't ask you to decide it. A. No.

Q. Did you have a discussion with these men about it?

A. I don't remember that. I don't believe it.

Q. You don't think you ever discussed it?

A. I don't believe it.

Q. Did you ever tell Luther Davis that we were not neutral because we were selling munitions and food to England and to France?

A. To Luther Davis, no; no, I did not.

Q. You believed it yourself, didn't you?

A. What?

Q. You believed yourself that we were not neutral, didn't you?

A. You see, sir, I told Von Borstel I form my opinion now. I just read it out of papers. They are some things that are high politic what I don't understand.

Q. You seem to be remarkably well versed in international law and military procedure, and in so far as discussions with these boys are concerned, with the question of neutrality; why have you no opinion about any of those things now?

A. You see, in my spare time, you know, they are the only pleasure I have, that is reading; and I like to read, and I study it well, I know better as them boys the history of the United States. I like to read the War of the Rebellion, and I want to discuss with boys—I did it with our boys, tried to; but them boys they don't know it, and I give it up.

(Testimony of Julius Rhuberg.)

Examination by the COURT.

Q. Just one other question: You said that you regretted [130] that this country went into war with Germany? A. Yes, sir.

Q. Do you think this country ought not to have gone into war with Germany, and allowed Germany a free hand against the allies?

A. No, your Honor, I don't mean that. But I thought the German Government ought to do somethings to prevent it, before it came that far.

Q. How is that?

A. I thought the German Government ought to do somethings to prevent it.

Q. To prevent war?

A. Yes, sir, to prevent war with the United States.

Q. The question I put to you was this: do you say that this Government ought not to have gone into war with Germany, and thus have allowed Germany a free hand against the allies? Is that your position?

A. Your Honor, if our Government, as I see now, it was justified to go into it. I believe that now. I believe that our country is justified to go in it now.

Q. You mean this country? A. Yes, sir.

Q. When you speak of "our country" you speak of this country?

A. Yes, I speak of the United States.

Q. You think, then, that this Government did right in going to war with Germany when it did go to war?

A. Yes, sir.

Q. That is your honest conviction?

(Testimony of Trueblood Smith.)

A. That is my conviction—honest conviction. [131]

Cross-examination (Continued).

Q. You say, in answer to the Judge's question, that you now think this country was justified?

A. Yes.

Q. When did you determine that this country was justified?

A. By degree—you read it—by degree it comes over you. You don't catch some things only at once.

Q. No, I don't get your point. When did you determine that we were justified in entering the war?

A. It grows up on a man by degree. You don't can say right away. I know the first trouble what I knowed the United States had with Germany was over the sinking of the "Lusitania."

Q. When did you determine that this country was justified in entering the war?

A. I don't can tell you the date. It grows on me by degrees.

Q. A month ago?

A. I don't can tell you the date; no, sir.

Q. Two months ago?

A. Longer than that ago.

Q. The first of January of this year, had you then determined it? A. Oh, long before.

Q. Had you determined it when you were talking to Luther Davis and his wife?

A. I don't know; and I don't think that I talked with Luther Davis and his wife that way.

Q. Had you determined it when you talked with

(Testimony of Julius Rhuberg.)

Corliss [132] Andrews?

A. Corliss Andrews that I talk with six months ago or seven months ago.

Q. Had you determined then that this country was justified? A. Oh, I don't know that.

Q. Had you determined it when you talked to William Mitchell?

A. It was a year ago, and Mr. Mitchell—I didn't thought about such things.

Q. Had you determined then that this country was justified?

A. I don't know that. It growed up by degrees. You see, we form our opinion out there in the country, that is all what we can, out of newspaper talk.

Q. Had you determined it when you talked to Mr. Sproul?

A. That was last fall—I don't know.

Q. Had you determined it when you talked with Preacher Smith?

A. That was a year ago; I don't know.

Q. Did you ever determine prior to your arrest?

A. Sure.

Q. When?

A. When I got arrested the first of January, then we was a long time into the war. We got used to it. First it come just as somethings you don't—it comes too sudden.

Q. Had you determined it prior to the time you took down the Kaiser's picture?

A. I paid no attention to the Kaiser's picture, that hung there. Surely then I knowed there was some

(Testimony of Julius Rhuberg.)

objection to it, what do I care about the picture?

Q. Do you want to tell this jury that that picture was not put up there at your suggestion? [133]

A. That ain't put up there at my suggestion.

Q. It was not.

A. No. They wanted to decorate a little them walls.

Q. It was taken down at your suggestion, wasn't it? A. I took it down myself.

Q. At the time you took that picture down, had you determined that this country was justified?

A. At that time, yes.

Q. And that was about the time you were arrested, wasn't it? A. That was after I was arrested.

Q. Yes. That is all.

Redirect Examination.

Q. Had you determined that the United States was justified in entering the war before you were arrested? A. Long before that.

Q. Did you know what you were arrested for?

A. No, I had no idea. I had no idea. It just happened. I was visiting over a friend, and we went up to Shaniko, and drove back, and he was going around the way by Kent, and the deputy marshal—I know him well—he came up to me and say, "You are wanted at Moro." I told him, "What they thinks they want with me? I don't can go this way." I just had overalls and Mackinaw on. And I went out of the auto, went in again. I thought he made fun with me. Then he showed me his star, and that evening—I say, "I don't can go

(Testimony of Julius Rhuberg.)

that way." Then he told me, "I am satisfied you have to go to Portland." And I says, "Dick, I can't go this way." I say, "You stop [134] and talk with the sheriff." The sheriff came up there.

COURT.—Do you want him to go over that matter?

Mr. JOHNSON.—Not concerned about it.

COURT.—Never mind that.

A. I had no idea until I came to Hood River. Then they told me what it was.

Q. Rhuberg, why is it that you haven't given more financial support to the war measures of the Government?

A. I don't had money enough. I just had few dollars, and I like to stretch it as far as possible. I hate to impose on my friends.

Q. Did you make any effort to get your money over here from Germany? A. I did.

Q. What effort?

A. I told Mr. Bourhill—he is banker of the State Bank, and he had bank before in Grass Valley—he knows my financial condition. And I ask him to inquire, and he inquired here by the leading banks in Portland if there was a way to get money, and two months ago he told me it was impossible. If I had idea of it—I had no idea that war would start—I have it before. There was nice place to buy; my friend was going to help me; but I hate to borrow money.

Q. Did you give anything to any of the campaigns for war funds? A. No.

(Testimony of Julius Rhuberg.)

Q. Do you recall the Armenian Drive? [135]

A. Oh, just little things, yes. Yes, I did that. I don't believe—I believe Young Men's Christian Association, what it was.

Q. Any of the others of those smaller drives?

A. Yes, I remember one day on the street—I don't know what kind it was—they asked me, and I give something.

Recross-examination.

Q. I think I asked you a while ago whether you had subscribed to the German Red Cross?

A. No, sir.

Q. You have not? A. No.

Thereupon the witness was excused. [136]

**Testimony of Carsten Von Borstel, for Defendant.**

The defendant, to further sustain the issues upon his part, called as a witness Carsten Von Borstel, who, being duly sworn, testified that he resided in Kent, Sherman County, where he has lived for thirty-three years; that for thirty-three years he has resided in the United States, during which time his occupation has been that of farmer, now having a ranch of about thirty-eight hundred acres; that he knows the defendant Rhuberg, does not know exactly how long they have been acquainted, but that during the past four years the defendant has lived upon the ranch of witness.

The witness further testified as follows:

Q. Do you know a young man called Corliss Andrews? A. Yes.

(Testimony of Carsten Von Borstel.)

Q. Andrews has testified for the Government in this case that in October or November of 1917, on two or three occasions he talked with Rhuberg at your house and in your presence, at the place known as the Home ranch, and that on those occasions Rhuberg stated to Andrews that the moneyed men had caused the United States to go into the war against Germany, and that Germany was in the right and the United States was in the wrong, and that Rhuberg hoped that Germany would win, and that Germany was sure to win, and that the best thing the enlisted and drafted men could do when in battle would be to put up their hands and let the Germans take them prisoners, and that one German could lick ten Americans; that the United States was so slow that Germany would have it whipped before the United States got ready for war, and that the United States had no business in the war, and ought not to have gone into it, or words to that effect. Now, state to the Court and jury whether or not those statements, or any similar statements, were made by Rhuberg to Andrews, in your presence, at any time.

A. I didn't hear any statements like that.

Q. If you had heard them, would you remember them? A. Sure.

Upon cross-examination, the witness further testified that he was sixty-nine years of age, had resided in the United States a little more than thirty-three years, and was [137] a naturalized American citizen, having been naturalized in Moro in the year

(Testimony of Carsten Von Borstel.)

1892; that he owns two farms, aggregating thirty-eight hundred acres, worth about twenty-five dollars per acre, all accumulated since coming to the United States; that he approved of the war policy of the United States and its efforts to defeat Germany, and had bought Liberty Bonds about a month before (Third issue) in the amount of $750.00 and $500.00 of the Second issue; also had contributed a couple of dollars to the American Red Cross and had made no contributions at any time to the German Red Cross; that he is probably worth one hundred thousand dollars; was a former Prussian soldier and had served in the Franco-Prussian war, but was not in the siege of Paris.

The witness was thereupon excused.

**Testimony of Harvey Smith for Defendant.**

The defendant, to further sustain the issues upon his part, called as a witness HARVEY SMITH, who being duly sworn, testified that he resided near Grass Valley, Sherman County, where he had lived for over forty years, and before the county of Sherman was created; that he is a farmer, owning a ranch of 1,360 acres, knows the defendant, and has known him for eighteen or twenty years, and during the period of his residence upon his (defendant's) homestead.

The witness further testified that during the period of his acquaintance with defendant he has known defendant's reputation for truth and veracity in the community in which they had both resided, and that

(Testimony of Harvey Smith.)

defendant's reputation is good; that he also, during that period, has known the reputation of defendant in that community for being a good, law-abiding citizen, and that such reputation was considered very good.

Upon cross-examination witness testified that since [138] 1913 he had met defendant only once, which was last summer, until very recently.

The witness further testified as follows:

Q. Do you know anything about his reputation as being a law-abiding citizen since that time?

A. Well, only what talk we had. We met after about seven or eight years that we hadn't seen one another, and we got to talking—we got to talking of this war; and he talked very loyally—very loyally. I was awful surprised when I heard it.

Q. When did he have that conversation with you?

A. It was one Sunday some time last summer; I think in harvest time.

Q. Now, that is the only time you have seen him since he returned from Germany?

A. Well, that was the first time. I have seen him since. I think I saw him about once since only, until I saw him here in the courtroom.

Q. Have you heard his reputation discussed any since he returned from Germany?

A. Well, yes, at that time a year ago and so on.

Q. I am not talking about the conversation between you and Mr. Rhuberg.

A. I know. I understand.

Q. Have you heard his reputation discussed any

(Testimony of Harvey Smith.)

since his return from Germany?

A. Yes, quite frequently. I heard of him returning some time before I met him, and they were discussing him then considerably.

Q. Who was discussing him?

A. Glad that he was coming back. Well, different people that had known him, and so had I known him. They told me that he had returned from Germany, and so on, speaking about him. That was about all.

Q. Have you heard his reputation discussed any during the present year?

A. Not a great deal, no.

Q. You haven't heard any laudatory expressions of his good citizenship? [139]

A. I haven't heard but very little about it. I have been very busy lately, in the last year. I don't get to town.

Q. How far do you live from the vicinity of Kent?

A. Oh, I must live 14 to 20 miles from Kent. I guess it is 20 miles from my ranch.

Q. You haven't heard any discussion of him since the first of January?

A. I have heard some little remarks, you know, since this thing came up, but only slightly. I don't get away from the ranch very often.

Whereupon the witness was excused.

**Testimony of L. Barnum, for Defendant.**

The defendant, to further sustain the issues upon his part, called as a witness L. BARNUM, who be-

(Testimony of L. Barnum.)

ing duly sworn, testified that he resided in Moro, Sherman County, where he has lived for forty years, and where he is engaged in the business of banking and farming; that he is Vice-president of the Bank of Moro and has known defendant since the year 1900; that he bought defendant's grain and handled his banking business from 1900 to 1903; that he knows the reputation of defendant in the community in which he resides for truth and veracity, and that such reputation is very good; that he likewise knows his reputation in that community from 1900 to 1903 for being a good, law-abiding citizen, and that during that period such reputation was very good, but that he knows nothing about his reputation in that respect since 1903.

Upon cross-examination the witness testified that he did not know anything about the present reputation of the defendant as to being a law-abiding citizen; that he is County Chairman of the State Council of Defense and himself reported the defendant for disloyalty; that since 1903 he knows nothing about the reputation of defendant as a law-abiding citizen except as a matter of hearsay; that during the year 1918 [140] and the latter part of the year 1917 there were about twenty-five complaints against him.

Upon redirect examination the witness was asked whether there were as many people taking the opposite stand and testified that there were a number; also testified that he made no investigation of the

(Testimony of L. Barnum.)
complaints which he, as County Chairman of the Defense League, had sent to Portland.

The witness was thereupon excused.

**Testimony of S. B. Holmes, for Defendant.**

Thereupon the defendant, to further sustain the issues upon his part, called as a witness S. B. HOLMES, who being duly sworn, testified that he resided eight miles south of Grass Valley, Sherman County, Oregon, where he has lived for almost thirty-two years, and where he is engaged in farming and stock raising, owning over fifteen hundred acres of land and farming in addition thereto some rented land; that he has known the defendant for about eighteen years or a little more; that during that time he has known his reputation in the community in which both witness and defendant reside for truth and veracity and for being a good law-abiding citizen, and that such reputation of the defendant is good.

Upon cross-examination the defendant testified that Grass Valley is about seventeen miles distant from Kent; that most of the discussion witness had heard of defendant's character or reputation during the year 1918 he had heard in Portland; that he had heard something about this case at the time defendant was arrested; that he could not tell right at this present time that defendant had the general reputation in the community of his residence of being a good, law-abiding, loyal American citizen, and that what he knew about him generally was what he had learned prior to this war; that [141] in the last

(Testimony of S. B. Holmes.)

few years he had not seen very much of defendant, nor heard much concerning his reputation since defendant returned from Germany, and that he does not know the present reputation of defendant in the community where he lives as to defendant's being a loyal, law-abiding citizen.

Whereupon the witness was excused.

**Tesimony of Arthur J. Bibby, for Defendant.**

Thereupon the defendant, to further sustain the issues upon his part, called as a witness ARTHUR J. BIBBY, who being duly sworn, testified that he lived seven miles from Kent, Sherman County, and had lived in Sherman County nearly twenty years, during which period he had followed the occupation of farming; that he was formerly in the United States Navy, where he served for two years and four months; that he has known defendant for seventeen years, the homestead taken up and lived upon by defendant having then adjoined the ranch of witness; that witness and defendant now reside about twelve miles apart, and that during the time of his acquaintance with defendant witness has known the reputation of defendant in the community in which he resides for being a truthful man, and that such reputation is good.

Upon cross-examination the witness testified that he spoke German and occasionally talked to defendant in that language; that he resides twelve miles from the place of residence of defendant, has known defendant "off and on" about seventeen years, and

(Testimony of Arthur J. Bibby.)

has met defendant three or four times since defendant's return from Germany in 1913; that on one occasion he met defendant at Grass Valley, where defendant was talking about the German Government; that on this occasion defendant was not condemning the German Government. [142]

The witness further testified as follows:

Q. He was praising it, wasn't he?

A. Well, the principal talk was about—I don't remember much about it, because there was no importance to it.

Q. Well, Mr. Bibby, it was important enough that you spoke to him about his mannerism, and about what he was saying, wasn't it? A. Yes.

Q. And you advised him to keep his mouth shut, didn't you? A. I didn't say that.

Q. Not in *that* words? A. Yes.

Q. But you advised him to restrain his tongue, and not criticize this Government?

A. I said that the Kaiser wasn't a very popular man now and that he had better not say much about that. That is all.

Q. He was speaking in a laudatory manner concerning the Kaiser then? A. In a what?

Q. He was praising the Kaiser? A. Well—

Q. Now, Mr. Bibby, when was that?

A. That was last fall some time.

Q. The fall of 1917, you mean?

A. Well, yes, 1917.

Q. That was in Kent or at Grass Valley?

A. Grass Valley.

(Testimony of Arthur J. Bibby.)

Q. And at that time you took occasion to tell him to be a little careful about the question of his patriotism, didn't you? A. Yes, sir.

On redirect examination the witness testified:

Q. What was the talk that was taking place there in connection with which you made that remark? [143]

A. Well, he was talking about—as far as I can remember—that the Kaiser owned some land there and in dairying, such stuff as that. He was not condemning us.

Q. He was not condemning our country?

A. No.

Q. And the talk about what—in connection with the Kaiser's dairy?

A. Well, something about butter-fat and stuff what he was making there.

Q. Well, did he say anything at that time, or at any other time, in your presence or to you, derogatory to the United States, or praising the German Government?

A. He was not praising the German Government any that I know of. Only I said not to mention the Kaiser too often now.

Q. I see. That is all.

Whereupon the witness was excused.

**Testimony of Luther Davis, for Defendant.**

Whereupon the defendant, to further substantiate and sustain the issues upon his part, called as a witness the Government witness LUTHER DAVIS, who testified as follows:

(Testimony of Luther Davis.)

Q. Mr. Davis, when you were on the stand before, I neglected to ask you whether or not you at any time discussed with the defendant Rhuberg war questions, or anything else, in the presence of William Mitchell? A. No, sir.

Q. That is all.

Thereupon the witness was excused.

**Testimony of Julius Rhuberg, in His Own Behalf.**

Whereupon the defendant, to further sustain the issues upon his part, again became a witness in his own behalf, and having been theretofore duly sworn, testified as follows:

Q. Mr. Rhuberg, Mr. Bibby testified just before the lunch hour—spoke of some incident which occurred at Grass Valley, some time last summer, in which he states he cautioned you against talking favorably *to* the Kaiser or to the German Government. Will you explain to the Court and jury what occurred at that time?

Mr. GOLDSTEIN.—Objected to, on the ground that Bibby was defendant's witness. Bibby had an opportunity to explain the conversation, and for this defendant now to alter that [144] explanation would in that respect tend to impeach his own witness. He is bound by the explanation that was given by Bibby, and for that reason I offer this objection.

COURT.—I think I will hear the explanation.

Q. State to the jury and court what occurred at that time, and how it came about.

A. The circumstance, as far as I remember, as I told you, I am a farmer, and just there in Holstein it was more kind of dairy farm, and one day I read

(Testimony of Julius Ruhberg.)

in the paper that the Kaiser—he is kind of man as much as I knew about him, he puts into everything; he is kind of Jack of all trades, as we say here. So I read in the paper that his cows or this one produced over five per cent butter-fat; and all what ever I can realize was three per cent. And I told my wife I would like to know what the Kaiser treats his cows with. That was the conversation, more or less, what I had. Then Mr. Bibby says, "He ain't very popular man around here. You better not talk about him."

Q. He said what?

A. The Kaiser wasn't very popular man around here; I don't have to talk about it.

Q. Was that said in a joking or a serious way?

A. Oh, I made fun of it. That I don't know if you gentlemens know to produce five per cent butter-fat, it takes a whole lot. I never can do that.

Thereupon the defendant was excused.

Whereupon the defendant rested.

Whereupon the Government rested. [145]

That thereafter and thereupon the following proceedings were had:

Mr. JOHNSON.—If your Honor please, before the arguments are begun, I want to renew the motion I presented at the conclusion of the Government's main case, for a directed verdict on the three remaining counts in this indictment, and for the reasons given at that time.

COURT.—The Court will overrule the motion, and you may have your exception.

Whereupon, following the arguments of counsel, the Court instructed the jury as follows:

INSTRUCTIONS.

Gentlemen of the jury, after having heard the testimony in this case the Court will instruct you as to the law of the case, so that you may be enabled by its application to be the better able to determine in the end what your verdict shall be upon the facts as disclosed by the evidence which you have heard from the witness stand. This case has occupied some time. It is one of vast importance to the Government of the United States, and it is also of great importance to the defendant; and it requires a very careful consideration at your hands. The Court has endeavored to conduct the case so that all matters may have been fairly gotten to your minds for your consideration, so that you may justly determine in the end what your verdict shall be.

This indictment is brought under what is known as "An Act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States; to punish espionage and better to enforce the criminal [146] laws of the United States and for other purposes." The indictment is drawn under the third section of this act, or rather under the last two clauses of that section. The act provides, having in view these two clauses only, that "Whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment

service of the United States, to the injury of the service of the United States," shall be deemed guilty of an offense, and the statute provides for its punishment.

The indictment is drawn in four counts, but as to the third count I instruct you that the Government has dismissed as to that, so that you will have nothing to do with the third count.

The first count in the indictment is based upon the first clause of the statute that I read to you, and the second and fourth counts are based upon the last clause. Now, it is alleged by the first count that at the times mentioned in the indictment and since April 6, 1916, this Government has been at war, and is now at war, with the Imperial Government of Germany. Then it is alleged that on the 27th day of October, at Kent, in Sherman County, the defendant did wilfully, knowingly, unlawfully, and feloniously attempt to cause insubordination, disloyalty, mutiny and refusal of duty in, within, and amongst the military forces of the United States, to wit, men of registration age and subject to and eligible for draft and conscription under the provisions of the Act of Congress of May 18, 1917, it being the act that I have read to you, by then and there stating, declaring, debating, and agitating [147] to and in the presence of the said men, and in particular one Corliss B. Andrews, as so being of the registration age and subject to draft and conscription, as aforesaid, and to other persons or in the presence of other persons to the grand jury unknown. The utterances alleged are as follows:

1. "That the moneyed men had caused the United States to enter the war against Germany."

2. "That Germany was in the right and the United States was in the wrong, and that he, the said defendant, hoped Germany would win and that Germany was sure to win."

3. "That the best thing (meaning the said men of the registration age and subject to draft) could do when in battle would be to put up their hands and let the Germans take them prisoners."

4. "That one German could lick ten Americans."

5. "That the United States was so slow that Germany would have it whipped before it, the United States, got ready for war."

6. "That the United States had no business in the war and ought not to have gone into it."

Then comes the formal part of the indictment. Now, gentlemen, that constitutes the first count of the indictment.

The second count alleges that on the same day and at the same place the defendant with intent then and there to obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States, did then and there knowingly, wilfully, unlawfully, and feloniously obstruct the said recruiting and enlistment service of the United States to the injury of the service of the United States by then and there and in the presence of the [148] said Andrews and others making and uttering the following statements. And then the same language is set out in the indictment as in the first count. That count is based upon the latter

clause of the statute which I read to you.

Then the fourth count alleges practically the same except that the time fixed for the uttering of the language is between the first day of June, 1917, and the last day of January, 1918, the exact date being unknown to the grand jury. It is also based upon the latter clause of the statute which I have read to you, and sets out the same language as is set out in the other two counts of the indictment before alluded to.

I will instruct you that this defendant has interposed a plea of not guilty to this indictment. That plea puts in issue every material allegation of the indictment, and casts upon the Government the burden of proving to your satisfaction beyond a reasonable doubt every element of the offense charged. A defendant charged by an indictment of an offense against the laws of the country is presumed to be innocent until proven guilty beyond a reasonable doubt, and this presumption continues with the defendant throughout the trial and until the evidence convinces you to a moral certainty to the contrary. The principle is one adapted to our policy and scheme of government, and it is to be applied in all criminal cases.

You will notice that the espionage statute, as I have read it to you, says, "Whoever when the United States is at war," shall do certain things shall be punished. I instruct you that at the times when it is charged that the defendant violated the statute this Nation was at war with the Imperial Government of Germany and had been since April 6, 1917,

so that you need not give this matter further thought.

Referring to the statute, "Whoever when the United [149] States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," I will define to you certain terms. Insubordination means disobedience to constituted authority, unruliness. Disloyalty means unfaithfulness to one's government, inconstancy, faithlessness. Refusal of duty is self-explanatory.

It is not necessary, gentlemen, that the men within draft age shall have actually entered the service. It is sufficient that a law of Congress has been enacted providing for thus assembling the military forces of the United States, and that the law is in course of being enforced, and the military forces are being assembled in pursuance of the act. Any wilful attempt to cause insubordination or disloyalty or refusal of duty among those whose duty it is to conform to the act—that is, to register, and thereafter to submit to the call of the Government to enter the service, and to stand ready to comply with all orders and requirements of the Government—constitutes a violation of the act and of its real spirit, intent, and purpose.

So that, if any one do anything intentionally and wilfully that is calculated or designed to incite to or to cause disobedience in those whose duty it is to serve this country in a military or naval capacity, or to discourage such or dissuade them from their line

of duty in that respect, is alike amenable to the statute. I instruct you as a matter of law that at the times stated in the indicement this Government was engaged in assembling its military and naval forces.

We next turn to the declaration of the act, "Whoever [150] when the United States is at war shall wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service of the United States." To obstruct in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent in whole or in part, and, as used in the indictment, it means active antagonism to the enforcement of the Act of Congress, that is, the act providing for the recruiting and enlistment service of the United States. The word does not mean as here used to wholly impede, or to block the way. It is sufficient that the act tends to hinder or to make it harder or more difficult for the Government to progress with the work of recruiting or enlistment of men into the service. Whatever has this effect works to the injury and damage of the Government. The injury follows as the necessary and logical effect and sequence of the act of retarding or making it harder or more difficult for the Government to act and carry forward the work of recruiting and enlistment. No other or more specific injury to the United States than this is necessary or required to be shown.

Having defined these offenses, so denounced by statute, you will appreciate how essential it is for the successful prosecution of the war that none of these evils shall possess the men of the country subject to

the selective draft, and that no obstruction shall be interposed in any way to impede, retard, hinder, or make it harder or more difficult for the Government to recruit and enlist men in the military service; hence there is great and wholesome reason for the statute, and the reason for its rigid enforcement is just as potent and overpowering. Nothing should interfere with the military and naval forces of the United States, nor with the work of recruiting or enlistment [151] of the men that go to make up such forces. Any means employed by which to cause the evils enumerated, or any one of them, is denounced. You will note that the term wilfully is employed in the statement of the statute as to what will constitute the offense. This means that the acts complained of must have been done with knowledge on the part of the defendant of what he was doing, and that he, having such knowledge, intentionally did the acts and intended thereby, and had such purpose therein, that the result of doing such acts would be to cause insubordination, disloyalty, or refusal of duty in the military service, or would tend to impede or hinder the recruiting and enlistment of men into the service, to the injury of the United States.

Now, keeping these things in view, you will determine, first, whether the defendant said the things imputed to him in the first count of the indictment, or any substantial part of them, and whether what he did say was calculated and designed to incite those persons to whom the words were spoken, or those who may have heard them, and who were within the draft age, to insubordination, disloyalty, or refusal

of duty in and towards the military service of the United States. If they were, and the defendant so intended that they should have that effect, he will have transgressed the law, and a verdict of guilty should follow.

If, however, these things have not been proven to your satisfaction beyond a reasonable doubt, then you should acquit as to the first count.

Then you will pass to the second and fourth counts, and determine whether the defendant said the things therein imputed to him, or any substantial part of them, and whether [152] what he did say was calculated and designed and intended on his part to obstruct, retard, or to make it harder or more difficult to progress with the recruiting or enlistment of men into the service on the part of the United States, and to the injury thereof. If what he said, if wilfully uttered, had this effect, he would be guilty; otherwise not. These two counts have relation to different occasions on which it is alleged that the acts were done and the words spoken. You must, therefore, consider each of them separately.

In this relation, I direct your further attention to certain language of count four, namely, that Rhuberg, at the times stated, did "speak, debate, and agitate to and in the presence of William Mitchell and Luther Davis, and others to the grand jury unknown." It is not a material variance between the indictment and the proofs if the evidence fails to show that the language alleged to have been uttered by the defendant, if in reality uttered, or some substantial part thereof, was uttered in the presence

of both said parties Mitchell and Davis; but it is sufficient if the language, or some substantial part thereof, was used by the defendant, with wilful purpose and intent, in the presence of one only of said persons. The essential inquiry is, Did the defendant wilfully use the language imputed to him, or some substantial part thereof, whether in the presence of both or either of them, or of other persons to the grand jury unknown, if any?

I will now instruct you as to intent. Intent and purpose are largely a matter of the mind and heart; and you must be guided pretty largely by a man's acts and demeanor. You must look into his heart and see what a man has there. What a man says as to his intention is not controlling unless [153] the jury believes him. The jurors have a right to and should consider what he says, and give it proper weight according to the credibility due him together with all the other evidence in the case, and determine what his real purpose and intention were. So it is here. You must judge this defendant as to his true intention and purpose, not only by what he says, having in mind his credibility, but by what he has done, by his acts and conduct at the time and previously, and his acts and conduct as you have observed them here. In this relation, I will say that the law presumes that every man intends the natural consequences of his acts knowingly committed, and in a case like this in which a specific intent affecting the act is a necessary element of the offense charged, the presumption is not conclusive but is probatory in character. It is for the consideration of the jury

in connection with all the other evidence in the case, considering all the circumstances as you may find them, including the kind of person that made the declaration, the place at which the declarations in this case were made, the persons who were present, and all the circumstances attending them, to the end that you may judge the real intent with which they were made. In a case of this character the jury may find from the facts and circumstances, together with the language used, the intent, even though the intent was not expressed—directly expressed. In other words, you may infer the intent from the character and the natural, ordinary, necessary consequences of the act.

Evidence has been admitted tending to show that defendant made certain statements derogatory to a friendly attitude on his part towards this Government as against Germany, prior to the time when war was declared by this country against [154] Germany, and prior to the time when this country became engaged in assembling military forces under the selective draft act. This evidence was admitted for a special purpose, and your consideration of it will be confined to that purpose only, namely: To show, so far as it has a tendency in that direction, the bent of mind and attitude of this defendant, whether more favorably disposed towards Germany than to this country, and the effect such attitude, whatever it was, may have had upon his subsequent acts and demeanor, as an aid for determining with what intent he used the language imputed to him by the indictment, if it appears that he uttered the

same, or some substantial part thereof.

The defendant was born in Denmark, but subsequently became a German subject, and later came to this country, and has since become naturalized in pursuance of the laws of the United States, so that he is a citizen of the United States, and is entitled to the same rights and privileges as other citizens of the country. He may engage in the discussion of public questions, and of men and measures, but he, like any other citizen or person sojourning in this country, temporarily or otherwise, is required to observe the laws of this country and the rules and regulations for assembling the armies and navies for carrying on the present war with Germany; and is answerable, like other persons, for the transgression of those laws, rules, and regulations. His oath of allegiance, by which he renounced all allegiance to Germany, binds him firmly to this country; and his loyalty to this country, as against the country of his nativity, should be single, and beyond question. He has taken the witness-stand in his own behalf, and has denied in large measure the utterances imputed to him, and as to others he disclaims any wrong or disloyal intention. **[155]** In determining touching the credibility of his statements, you will take into consideration the testimony of the Government which tends to his inculpation, his former history and deportment, his bent of mind so far as is disclosed by the testimony, and his predilection, if any, whether favorable or unfavorable to this Government, and what leaning, if any, he has towards Germany as against this Government in the present crisis, or

whether his present leaning is one of loyalty to this Government, and from all this, together with all the other testimony in the case bearing upon the subject of inquiry, you will ascertain and determine, by a calm, fair, and impartial inquiry and investigation, uninfluenced by any present passion or prejudice, the truth of the charges made against him in the indictment, and thus resolve your verdict, whether it shall be one of guilty or not guilty.

The term reasonable doubt, gentlemen of the jury, is one often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt, because everything relating to human affairs and depending on mortal evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge. It is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding, and satisfies the reason and judgment of [156] those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt.

I instruct you, gentlemen of the jury, that you are the sole judges of the credibility of witnesses and the weight and value to be given to their testimony.

The court gives you the law of the case, and it is your duty to take the law implicitly from the court and apply it, and observe the rules as the court has laid them down for your guidance. In determining as to the credit you will give to a witness and the weight and value you will attach to a witness's testimony, you should take into consideration the conduct and appearance of the witness upon the witness-stand; the interest of the witness, if any, in the result of the trial; the motives of the witness in testifying, the witness's relation to or feeling for or against the defendant or the alleged injured party; the probability or the improbability of the witness's statements; the opportunity the witness had to observe and to be informed as to the matters respecting which such witness gives testimony, and the inclination of the witness to speak the truth, or otherwise, as to matters within the knowledge of such witness; and you should be slow to believe that any witness has testified falsely, but should try to reconcile the testimony of all the witnesses so as to give credit and weight to all the testimony if possible. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit and the testimony of each witness such value and weight as you deem proper.

I will say, in this connection, that the defendant has been a witness in the case in his own behalf. You will treat him as any other witness in the case and apply the same [157] rules in order to determine his credibility as you would apply to the other wit-

nesses, taking into consideration his interest in the case or the outcome of the case.

Now, gentlemen, there are three counts left for your consideration. These counts, as I have indicated, you may consider separately, and pass upon each of them one by one, and you may find guilty upon one or more counts or not guilty upon one or more of the counts; or guilty upon all, or not guilty upon all, as the facts in the case may warrant your judgment.

What the court may have said during the trial of this case at any time, from which you might infer that the court has an opinion as to the facts proved, you will disregard, because it is wholly within your province to determine the effect of the testimony.

Now, gentlemen, the importance of this case, and the marked public concern that is involved, renders it desirable that it be settled by your verdict. A juror should not yield his honest convictions, nor is he required to in any case; but one may inquire, How does he come by his convictions? He begins to gather impressions as the evidence is adduced, and those impressions will be strengthened or modified, or recast, as the case proceeds. But his ultimate judgment should be withheld until he has had the benefit of discussion and deliberation with his fellow-jurors in the jury-room. There he will be confronted with lines of reasoning and thought that may not have come to him before; and shades of meaning and emphasis, and importance or lack of importance, or bearing of different phases of the testimony, may be examined and discoursed upon, which

may cast an obviously different light upon the general subject of investigation, and each juror may be materially aided by the [158] suggestion, discussion, and reasoning of his fellow-jurors. Thus it may be found in the end that shades of differences in the interpretation of evidence, and respecting the motives which prompted the action of the accused, whatever it may have been, have been harmonized, and that the conviction of one is the common conviction and deliberate judgment of all. There is always wisdom in counsel, and conscientious conviction comes from fair and candid discussion by which first impressions may be digested, and recast if obviously mistaken, and finally matured. I admonish you, therefore, gentlemen, thus to deliberate of and concerning your verdict, and thereby to determine in the end what it shall be.

I further instruct you, gentlemen, that the matter of what punishment shall be meted out should the defendant be convicted is one resting alone in the sound discretion of the court. The jury is not and ought not to be concerned with that, but only with determining as to guilt or innocence. The law in cases of this nature has vested a very wide discretion in the court as to the extent of the punishment, so that it might be adjusted according to the degree of guilt attaching to acts of the accused; the discretion to be exercised under the evidence as developed on the trial.

Mr. JOHNSON.—I am not clear as to whether your Honor has instructed the jury that as to count 4 of the indictment there must be proven by the

Government the same elements of offense—injury to the enlistment service.

COURT.—I instructed about that.

Mr. JOHNSON.—Have they been instructed that that is the law?

COURT.—I have instructed that. [159]

Mr. JOHNSON.—I followed your Honor's instructions very carefully with that point in mind, and I did not get it.

COURT.—Well, I instructed that it is sufficient that the act tends to hinder or to make it harder or more difficult to progress with the work of enlisting or recruiting men into the service. Whatever has this effect works to the injury and damage of the Government. The injury follows as the necessary and logical effect and sequence of the act of retarding or making it harder or more difficult for the Government to act and carry forward the work of recruiting and enlistment. No other or more specific injury to the United States is necessary or required to be shown.

Mr. JOHNSON.—In connection with the Court's instruction concerning the discretion of the Court in the matter of punishment, I think the jury might properly be instructed that this offense is a felony, and that conviction of it forfeits the rights of citizenship, and that is a matter that is without the discretion of the Court; that is something regulated by statute.

COURT.—Well, that is not a matter for the jury's consideration at all.

Mr. JOHNSON.—I desire to save an exception to

the instructions of the Court in that respect.

COURT.—Very well.

Mr. JOHNSON.—And in respect of the Court's instructions defining what constitutes the military and naval forces of the United States; and the Court's instructions concerning the question of variance in the proof and allegations as concerns count 4 of the indictment; and the refusal of the Court to give the instructions requested by the defendant as contained [160] in the copy I furnish the reporter.

COURT.—I will give this part of your instruction. The part that I started to read was not applicable in this case, while it was in the former case. I will give this part of your instruction:

Witnesses have been produced and testimony offered on behalf of the defendant designed and intended to discredit the testimony of certain of the Government's witnesses. I instruct you, in this connection, that it is entirely proper to show that witnesses have made statements contradictory of or inconsistent with their testimony. This is one of the means provided and permitted by law for testing the credibility of a witness and enabling a jury to determine what weight should be given to his testimony. And I further instruct you that a witness found to be false in one part of his testimony is to be distrusted in others.

It is further certified that within the time limited by the rules of the Court so to do, the defendant in writing requested that the Court give the following instruction to the jury.

Counts II and IV of the indictment, while charging distinct violations by the defendant of the statute known as the Espionage Act, in that the statements alleged to have been made by the defendant Rhuberg, and set forth in these counts of the indictment, were made at different times, and to different persons, are yet largely identical in character. They are both drawn under the same provision of the statute, a provision which makes it unlawful for any person while the United States is at war with any foreign power, to wilfully obstruct the recruiting or enlistment service of the United [161] States, to the injury of the service, or to the injury of the United States. You will therefore note that there are three elements which must be proven before a verdict of guilty may be rendered upon either of these counts of the indictment. First, there must exist the state of war mentioned; second, there must be a wilful obstruction of recruiting or enlistment; third, there must result an injury to the recruiting or enlistment service, or to the United States. I instruct you, gentlemen of the jury, that if the Government has failed to prove to your satisfaction, and beyond a reasonable doubt, any one of these three elements of the offense charged in Counts II and IV of the indictment, your verdict must necessarily be as to these counts a verdict of not guilty. And since the Government has not shown that the statements charged in Counts II and IV of the indictment to have been made by the defendant Rhuberg did in fact result in any injury whatsoever, either to the recruiting or enlistment service of the

United States, or to the United States, your verdict upon Counts II and IV of the indictment must be verdicts of not guilty.

Except as portions of the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception.

It is further certified that within the same time the defendant in writing requested the Court to give to the jury the following instruction:

I instruct you, gentlemen of the jury, that before you can find the defendant guilty of the charge preferred against him in the fourth count of the indictment, you must find that the statements charged in that count to have been [162] made by him, or some of them, were made substantially in the form alleged, in the presence of both Luther Davis and William Mitchell, and since it conclusively appears by the testimony of both the Government and the defense that no such statements or any statements were made by the defendant since the Espionage Act became a law, in the presenec of these two men, you must find a verdict of not guilty upon this count of the indictment. It is incumbent upon you to try this defendant solely upon those charges preferred against him in this indictment, and if at times other than those mentioned in the indictment he has violated some law of the United States, he cannot in this trial be tried or convicted of such other offenses.

The Court refused to give said instruction to the jury, and did not give the same, and to this refusal,

the defendant asked and was allowed an exception.

It is further certified that thereafter, and after the return by the jury of the verdict in said cause, and within the time limited by the Court so to do, defendant filed and presented to the Court his motion for an order setting aside the verdict and granting a new trial upon the grounds in said motion stated, which motion was overruled by the Court and exception allowed.

It is further certified that thereafter, and within the time limited by the rules and order of the Court, defendant filed in said Court and presented his motion for an order arresting judgment in said cause, upon the grounds in his said motion stated, which motion was thereafter by the Court overruled and exception of defendant allowed.

And now, because the foregoing matters and things are not of record in this case, I, Charles E. Wolverton, the Judge who tried the above-entitled cause in the above-entitled Court, do hereby certify that the foregoing Bill of Exceptions correctly and fully states the proceedings and all thereof **[163]** and contains, and fully and accurately sets forth, all of the testimony and evidence adduced upon said trial, and contains all the instructions of the Court to the jury, and truly states the rulings of the Court upon the questions of law presented, and the exceptions taken by the defendant appearing therein were duly taken and allowed; that said Bill of Exceptions was prepared and submitted within the time allowed by the order of this Court and the rules thereof, and containing the evidence adduced against defendant

at said trial, and all thereof as aforesaid, is now signed, and settled as and for the Bill of Exceptions in said cause, and the same is hereby now ordered to be made a part of the record in said cause.

It is further ordered that all of the original exhibits introduced in evidence in the trial of this cause and now in the custody of the Clerk of this Court be made a part of this Bill of Exceptions and filed therewith.

IN WITNESS WHEREOF I have hereunto set my hand this 10th day of July, 1918.

CHAS. E. WOLVERTON,
Judge United States District Court.

Filed, July 10, 1918.

G. H. MARSH,
Clerk.

United States of America,
State of Oregon,
County of Multnomah,—ss.

Due, timely, and legal service by copy admitted at Portland, this 24th day of June, 1918.

B. E. HANEY,
U. S. District Attorney for the District of Oregon.
**[164]**

AND AFTERWARDS, to wit, on the 25th day of July, 1918, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit: **[165]**

*In the District Court of the United States for the District of Oregon.*

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.
JULIUS RHUBERG,
Defendant and Plaintiff in Error.

**Praecipe for Transcript on Writ of Error.**

To the Clerk of the Above-entitled Court:

You will please include in the record of the above-entitled cause to be docketed in the Circuit Court of Appeals upon writ of error of defendant and plaintiff in error Julius Rhuberg, and cause to be printed as the record in said Court of Appeals, the following:

1. Indictment.
2. Plea of defendant.
3. Verdict of Jury.
4. Motion of defendant for a new trial and for order arresting judgment.
5. Order overruling motion of defendant for a new trial and for arrest of judgment.
6. Judgment and sentence.
7. Bill of exceptions.
8. Writ of error.
9. Petition for writ of error and assignment of error.
10. Bond on writ of error.
11. Order enlarging time to file and docket case in appellate court.

12. Praecipe for transcript. **[166]**

Dated at Portland, Oregon, this 22d of July, 1918.

G. G. SCHMIDT,
RIDGWAY & JOHNSON,
Attorneys for Defendant and Plaintiff in Error Julius Rhuberg.

United States of America,
State of Oregon,
County of Multnomah,—ss.

Due, timely, and legal service by copy admitted at Portland, this 22d day of July, 1918.

B. E. HANEY,
Attorney for Plaintiff and Defendant in Error.

Filed, July 25, 1918.
G. H. MARSH,
Clerk. **[167]**

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages No. from 6 to 167, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Julius Rhuberg, plaintiff in error, against the United States of America, defendant in error, in accordance with the praecipe filed by said plaintiff in error as the same remain of record and on file in my office and in my custody.

I further certify that the cost of the foregoing

transcript is $51.30, and that the same has been paid by the said plaintiff in error.

[Seal] G. H. MARSH,
Clerk, United States District Court, for the District of Oregon. [168]

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[Endorsed]: No. 3196. United States Circuit Court of Appeals for the Ninth Circuit. Julius Rhuberg, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record Upon Writ of Error to the United States District Court of the District of Oregon.

Filed August 7, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3196

# United States Circuit Court of Appeals

## For the Ninth Circuit

JULIUS RUHBERG
*Plaintiff in Error*

vs.

THE UNITED STATES OF AMERICA
*Defendant in Error*

# Brief for Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon

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and
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Oregonian Building, Portland, Oregon
Attorneys for Plaintiff in Error

No. 3196

# United States Circuit Court of Appeals

## For the Ninth Circuit

JULIUS RUHBERG
*Plaintiff in Error*

vs.

THE UNITED STATES OF AMERICA
*Defendant in Error*

# Brief for Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon

### STATEMENT OF THE CASE.

By indictment returned March 1, 1918, into the United States District Court for the District of Oregon, Julius Ruhberg was charged in four counts with as many violations of Section 3 of the Act of Congress approved June 15, 1917, known and hereinafter referred to as the "Espionage Act." The

section in question at the time the offenses are charged to have been committed provided:

> "Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

Upon a plea of not guilty, the cause proceeded to a first trial begun April 24, 1918, which resulted in a dismissal by the Government of Count III of the indictment, after announcement by the court that a verdict of not guilty would be directed upon that count, and a disagreed jury and mis-trial upon the remaining counts of the indictment. A second trial, begun May 7, 1918, resulted in a verdict of conviction upon Count IV, and acquittal of the charges made in all remaining counts. This honorable court is therefore concerned with Count IV only of the indictment, which, summarized, charges that between June 1, 1917, and January 1, 1918, at particular dates unknown to the grand jury, but while a state of war existed between the United States

and Germany, Ruhberg, with intent to do so, did in Sherman County, Oregon, knowingly, wilfully, unlawfully and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of the service, and the United States, by stating to or in the presence of William Mitchell and Luther Davis:

> 1. That the moneyed men had caused the United States to enter the war against Germany.
>
> 2. That Germany was in the right and the United States was in the wrong, and that he, Ruhberg, hoped Germany would win, and that Germany was sure to win.
>
> 3. That the best thing that they (meaning the men of registration age and subject to draft) could do when in battle would be to put up their hands and let the Germans take them prisoners.
>
> 4. That one German could lick ten Americans.
>
> 5. That the United States was so slow that Germany would have it whipped, before it, the United States, got ready for war.
>
> 6. That the United States had no business in the war and ought not to have gone in it.

Plaintiff in error is fifty-seven years of age, and was born in Schleswig-Holstein, while that province was a part of Denmark, but is of German parentage, and was educated in Germany, performing his compulsory military service in the German army before emigrating to the United States. He came to the United States in 1884, going to a rancher uncle who

resided in Nevada, and two years later, in 1886, coming to Central Oregon, where he found employment herding sheep, and where he remained either so employed, or tending sheep camps and working in wool warehouses, for a period of approximately fourteen years. Ruhberg became a naturalized citizen of the United States shortly after coming to Oregon, having made his declaration of intention in Nevada in 1884 or 1885. He went to Germany in 1900 for a short visit, and while there married, returning to Central Oregon with his bride a few months later. There plaintiff in error and his wife resided upon his sagebrush homestead until 1904, when he and his wife sold the homestead with their farming implements for the sum of $2,000, and returned to Germany.

The record shows that various causes brought about the second visit to Germany. Ruhberg's wife, who prior to their marriage had always resided in the comparatively large city of Hamburg, had borne no children, and could not become reconciled to the lonely life of a Central Oregon homesteader. His father, a Hamburg merchant, had died, leaving property interests of considerable value, and somewhat involved. A brother of Ruhberg, who had been handling the business and affairs of the father's estate, had also died shortly before, and the mother of plaintiff in error was importuning him to return to Hamburg and assist her

in the settlement of her deceased husband's estate and affairs. This proved a task of some consequence, and operated to defer the return of Ruhberg to the United States until the year 1913, when he returned to Sherman County, after arranging with his wife to follow him shortly thereafter.

Upon his return to Sherman County in 1913, Ruhberg took up a residence in the locality of his former home with one Von Borstel, a friend of many years' standing, and assisted as best he could in his then crippled condition in the operation of two large wheat and stock ranches owned by Von Borstel, while awaiting the arrival of his wife, and pending the purchase by plaintiff in error of a ranch of his own. Before final settlement of the father's estate could be made and the wife embark for America with their share of the estate proceeds, the war broke out. Travel from German ports becoming thereupon dangerous and greatly restricted, she remained in Germany and presumably is still there, but whether alive or dead her husband knows not.

Ruhberg therefore continued in the employment of Von Borstel on the ranch locally known as the "Mackin Place," hauling wheat to the village and shipping point of Kent, working in the harvest fields, caring for the stock, doing kitchen and housework, and strictly attending to his own work and business. It conclusively appears from the record

that from the return of Ruhberg to Sherman County in 1913 until his arrest nearly five years later, he was not outside that county. For days at a time he saw no other person. He sought no new acquaintances, and seldom saw his old ones. He did no visiting about the neighborhood of his employment, and was never found at public gatherings of men, old or young. His walks of life lay in a sparsely settled part of interior Oregon, remote from centers of population, barely touched by modern transportation lines, and hundreds of miles from any of our military cantonments. Those who talked with him during this time either sought him out for that purpose, or met him in the course of his employment.

It likewise appears from the record in this case that in the early part of June of 1917, and apparently before the Espionage Act became a law of this country, William Mitchell came from a field he was plowing to a place where Ruhberg was unloading rocks he had hauled from the Von Borstel fields, for the purpose of obtaining from Ruhberg a drink of water, Mitchell having no water with him. Mitchell states that on this occasion, which was the only time he ever talked with plaintiff in error, the talk drifted to war subjects, and that Ruhberg thereupon said:

> "That this country had no business in the war against Germany, it was not our war, the working people's war, it was the rich man's

war, and that they would be helpless anyway, and that before we could do any good the West front would be taken and the French and English whipped; that it would take ten Americans to stand off one German and that we were wrong in entering the war, as it was not our fight; that the rich men had caused the war, and it was not our war."

Mitchell is positive that he never talked with Ruhberg when Luther Davis was present, as is charged in the indictment. It *conclusively appears* from his testimony that Mitchell was, at the time of this conversation, of the age of thirty-four years; outside the draft; had a wife and four children, the oldest but ten years of age; that solely on account of his family, and for no other reason, he had never thought of enlisting in the military service, and that he *paid no attention whatsoever* to anything Ruhberg had said to him.

The Government witness, Luther Davis, was a renter and farmer of lands located on the road between the Mackin ranch and the wheat warehouse at the station of Kent. He was younger than Mitchell, and at the time of some of his later conversations with Ruhberg had registered for military duty under the Selective Service Act of May 18, 1917, and had received a deferred classification. The wife of the witness Davis had been very friendly with Mrs. Ruhberg during the residence of the latter in the United States, and when Ruhberg stopped at the Davis home enroute to or returning from

Kent, Mrs. Davis would usually make some inquiry concerning Mrs. Ruhberg. Both Mr. and Mrs. Davis state that his inability to get any word from his wife or to her for more than a year, due to stoppage of mails to and from Germany, was a matter concerning which Ruhberg complained bitterly, and which always provoked him to criticism of the methods of the allied countries at war. Davis stated, over objection of counsel for plaintiff in error, that early in the spring of 1917, and prior to the entrance of the United States into the war, he had discussed war topics with Ruhberg, when Ruhberg had said that he

> "could get no letters from his wife in Germany because of the censor, and blamed the English for that; that the English got ammunition from Americans, and Germany couldn't get anything, that we were sending ammunition to kill the Germans with and had no business doing that; that the United States had no business interfering with the allies, and that we never had been neutral; that Germany was a fine country, far superior to the United States; that you had more freedom and could get anything you wanted, whiskey or wines, or anything you wanted there; that you couldn't get anything you wanted here any more; that he had been in the German army about three years, and had been in the Franco-Prussian war; that the training of the German army was far superior to the American army; that he was in the German cavalry training, and told what a fine horse he had, and what fine training he went through; that Germany was perfectly right in sinking the Lusitania; that ships carrying con-

> traband of war with passengers on them who had no more sense than to ride in time of war ought to be sunk; that if this country got into the war, Germans in this country would rebel against this government; that this country was in no shape to fight the German Government; that we were so slow that Germany would have the allies licked before we got ready to fight, and then come to the United States; that Germany was in the right, and she was bound to win, and that the German Government always took the right side to everything; that they never had lost a war and they never would."

Davis also stated that after the United States had entered the war, and in November of 1917, he and Mrs. Davis had gone to the home of Ruhberg at the Mackin ranch for some vegetables Ruhberg had given them, and there saw on the walls of a room of the house a picture of the German Kaiser, and a German flag, and on a table underneath, a small boat model carrying three American flags. On that occasion, according to Davis, Ruhberg spoke

> "about fighting in the Franco-Prussian war and what a fine army Germany had; saying that we had no business in the war, had no call whatever to be into the war; that the moneyed men and men of the shipping interests and men around these big steel factories in the East making munitions were the men that had brought us into the war; that he wouldn't advise any man that didn't have a surplus amount of money to invest in Liberty Bonds, for in a couple of years they would go down, they probably wouldn't be worth 25 per cent under par;

that he would advise me not to enlist, not to get into the army until after I was drafted; that if a bullet didn't kill me I would die of sickness on account of so many dead people, and that Mr. Von Borstel after seeing some American troops in The Dalles, said that they handled a gun like a kid would."

Davis states that at the time of the conversation last mentioned, Ruhberg knew he had registered, and was subject to draft; that the conversations had with Ruhberg prior to the entrance of the United States into the war had caused him to begin to think that Germany was in the right; that the United States was not neutral in sending ammunition to the allies, and that the sinking of the Lusitania was justified. The United States attorney then said:

"Q. Now, what effect did the conversations of Ruhberg have with you subsequent to our entrance into the war?

A. It didn't have much of any, that didn't.

Q. What was the reason of the change?

A. Well, other people talked to me, different people around. I quit visiting Borstels, and other people got talking to me, and I got it out of my head; it put me to thinking."

Answering a question of the court, Davis testified that Ruhberg appeared to be very much in earnest at the time of his last conversation with him about the war, and appeared to try to impress upon Davis what he said.

Davis further stated that the flags spoken of as seen by him on the walls of the Mackin house were small cotton flags which may have come in boxes of cigarettes, that Ruhberg had never claimed them or called the attention of Davis to them in any way, but had stated that a boy named Wiley had brought them there and given them to one of the Von Borstel boys; that he also saw at the same time and place, and on the bedroom door, an American flag of about the same size as the one of Germany; that Ruhberg had never advised him to desert in event he had to go into the service; and speaking of the Liberty loans had told Davis of financial losses the Ruhberg family had sustained through purchase by his father many years ago of German Franco-Prussian war bonds, which had depreciated 33 1-3 per cent.

Davis then testified as follows:

"Q. Now, these statements that he made to you that you speak of, after we came into the war, they didn't influence you in any way, or deter you from enlistment, did they?

A. No, sir; they didn't keep me from enlisting, but still it made me feel bad.

Q. You hadn't intended or expected to enlist, had you?

A. No, sir.

Q. Nothing he said influenced you in the matter, or changed your intentions in any way as regards going into the service?

A. Well, if I hadn't been married, it probably would have.

Q. But you were married?

A. I was, yes.

Q. And had no intention of going until you had to?

A. No, sir.

Q. The only reason you didn't go was because of your wife and your baby?

A. Yes, sir.

Q. How old is the baby?

A. Eleven months old."

Davis was likewise positive he had never talked with Ruhberg in the presence of Mitchell, as charged in the indictment. The witness, Mrs. Davis, largely corroborated the testimony of her husband, concerning statements made by Ruhberg at their home, and the circumstances under which they were made, stating that Ruhberg's chief complaint was because he had been unable to hear from his wife in Germany, and to get mail from or to her; concluding with the statement that her husband, Luther, had made no effort at any time to enlist.

It is this testimony, and this alone, which is relied upon to support the judgment of conviction of Count IV. At the close of the Government's case a motion was made for a directed verdict of "not guilty" upon this count for the reason that no evidence had been presented showing, or from which the jury might find, any injury to the recruiting

or enlistment service of the United States or to the United States by reason of any statements or acts of Ruhberg; by reason of the variance between the charge and the proof—it appearing from the proof that Ruhberg had at no one time discussed war topics in the presence of both Mitchell and Davis—and for the further reason that any such statements made by Ruhberg to Mitchell were made prior to the enactment and approval of the Espionage Act, and before it became a law of the United States.

The motion was overruled by the court. At the close of the defendant's case this motion was renewed, overruled, and exception allowed. The case was given to the jury without any proof whatsoever being offered of an *actual obstruction* by Ruhberg of the recruiting or enlistment service of the United States; without any proof whatsoever of a resulting or consequent *injury* to that service, or to the United States, as charged in the count; and in the face of uncontradicted testimony of *every* witness for the Government that any statements made by Ruhberg had *not* so operated. Instructions requested by plaintiff in error for a directed verdict of "not guilty" upon this count were also refused and exception taken and allowed.

After the verdict of conviction as concerns Count IV was returned, motions for a new trial and in arrest of judgment were filed on behalf of Ruhberg

and overruled, and sentence of fifteen months' imprisonment in the McNeil Island penitentiary and fine of $2,000 imposed. To right the imposition of this judgment, writ of error has been sued out in this honorable court.

Taking the evidence against plaintiff in error as uncontradicted, and wholly ignoring the defense offered, it presents at the best and in the fullest aspects, no more than *unsuccessful attempts* on the part of Ruhberg to obstruct the recruiting and enlistment service of the United States, which is *not* made a crime by the provisions of the Espionage Act, or any other federal law; and wholly without *resulting injury* to the recruiting or enlistment service of the United States, or to the United States, which *is* by Congress made an element of the offense denounced by Section 3 of the Espionage Act; which *is* charged in the indictment; and of which proof beyond reasonable doubt *is required.*

## ASSIGNMENTS OF ERROR.

I.

Error of the court in overruling the motion of defendant for a directed verdict of not guilty for failure of proof of the offense charged in Count IV of the indictment.

II.

Error of the court in failing and refusing to direct a verdict of not guilty for failure of proof of the offense charged in Count IV of the indictment.

III.

Error of the court in overruling the motion of defendant for a directed verdict of not guilty of the offense charged in Count IV of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant.

IV.

Error of the court in failing and refusing to direct a verdict of not guilty of the offense charged in Count IV of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant.

V.

Error of the court in refusing to give the jury the following instruction:

"Counts II and IV of the indictment, while

charging distinct violations by the defendant of the statute known as the Espionage Act, in that the statements alleged to have been made by the defendant Ruhberg, and set forth in these counts of the indictment, were made at different times, and to different persons, are yet largely identical in character. They are both drawn under the same provision of the statute, a provision which makes it unlawful for any person while the United States is at war with any foreign power, to wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service, or to the injury of the United States. You will therefore note that there are three elements which must be proven before a verdict of guilty may be rendered upon either of these counts of the indictment: First, there must exist the state of war mentioned; second, there must be a wilfull obstruction of recruiting or enlistment; third, there must result an injury to the recruiting or enlistment service, or to the United States. I instruct you, gentlemen of the jury, that if the Government has failed to prove to your satisfaction, and beyond a reasonable doubt, any one of these three elements of the offense charged in Counts II and IV of the indictment, your verdict must necessarily be as to these counts a verdict of not guilty. And since the Government has not shown that the statements charged in Counts II and IV of the indictment to have been made by the defendant Ruhberg did in fact result in any injury whatsoever, either to the recruiting or enlistment service of the United States, or to the United States, your verdict upon Counts II and IV of the indictment must be verdicts of not guilty."

VI.

Error of the court in refusing to give the jury the following instruction:

> "I instruct you, gentlemen of the jury, that before you can find the defendant guilty of the charge preferred against him in the fourth count of the indictment, you must find that the statements charged in that count to have been made by him, or some of them, were made substantially in the form alleged, in the presence of both Luther Davis and William Mitchell, and since it conclusively appears by the testimony of both the Government and the defense that no such statements or any statements were made by the defendant since the Espionage Act became a law, in the presence of these two men, you must find a verdict of not guilty upon this count of the indictment. It is incumbent upon you to try this defendant solely upon those charges preferred against him in this indictment, and if at times other than those mentioned in the indictment he has violated some law of the United States, he cannot in this trial be tried or convicted of such other offenses."

VII.

Error of the court in overruling the objection of the defendant to and receiving in evidence and in permitting the witness Luther Davis to testify to statements made to him by defendant, and conversations had between him and defendant, upon subjects relating to the war, and had and made prior to the entry of the United States into the war.

VIII.

Error of the court in overruling the motion of the defendant for arrest of judgment by reason of the failure of Count IV of the indictment to state facts sufficient to constitute an offense against the United States.

IX.

Error of the court in overruling the motion of defendant for an order setting aside the verdict and judgment of conviction and granting defendant a new trial.

## BRIEF AND ARGUMENT.

I.

Error of the court in overruling the motion of defendant for a directed verdict of not guilty for failure of proof of the offense charged in Count IV of the indictment.

II.

Error of the court in failing and refusing to direct a verdict of not guilty for failure of proof of the offense charged in Count IV of the indictment.

V.

Error of the court in refusing to give the jury the following instruction:

> "Counts II and IV of the indictment, while charging distinct violations by the defendant of the statute known as the Espionage Act, in that the statements alleged to have been made by the defendant Ruhberg, and set forth in these counts of the indictment, were made at different times, and to different persons, are yet largely identical in character. They are both drawn under the same provision of the statute, a provision which makes it unlawful for any person while the United States is at war with any foreign power, to willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service, or to the injury of the United States. You will therefore note that there are three elements which must be proven before a verdict of giulty may be rendered upon either of these counts of the indictment. First, there must exist the state of war mentioned; second, there must be a willful obstruction of recruiting or en-

listment; third, there must result an injury to the recruiting or enlistment service, or to the United States. I instruct you, gentlemen of the jury, that if the Government has failed to prove to your satisfaction, and beyond a reasonable doubt, any one of these three elements of the offense charged in Counts II and IV of the indictment, your verdict must necessarily be as to these counts a verdict of not guilty. And since the Government has not shown that the statements charged in Counts II and IV of the indictment to have been made by the defendant Ruhberg did in fact result in any injury whatsoever, either to the recruiting or enlistment service of the Uinted States, or to the United States, your verdict upon Counts II and IV of the indictment must be verdicts of not guilty."

The first, second and fifth errors assigned go to the same questions, i. e., the necessity, before conviction may be had of the offense of obstructing the recruiting or enlistment service of the United States, of proof of an *accomplished and actual obstruction* as distinguished from an *attempt to obstruct;* and *proof of injury* thereby to the service or to the United States. That the offense of obstructing the recruiting and enlistment service does not include attempts to so do is elementary. As is said by Judge Wharton, there can by common law be no conviction of *attempt* on a count for *consummated crime*: Wharton's Criminal Law, Sec. 237; Wharton's Criminal P. & P., Sec. 261. And such is the holding of Judge Bourquin in the recent and squarely parallel case of *United States v. Hall*

(Dist. Court, District of Montana), 248 Fed. Rep. 150-153, where, in granting a motion for a directed verdict of not guilty, the court says:

> "Nor does the evidence sustain the charge of 'wilfully obstructing the recruiting or enlistment service of the United States, to the injury of the service of the United States.' To sustain the charge, *actual obstruction and injury must be proven*, not mere *attempts to obstruct*. The Espionage Act does not create the crime of attempting to obstruct, but only the crime of actual obstruction, and when causing injury to the service. Whenever Congress intended that attempted obstructions should be a crime, it plainly said so, as may be seen in the statute making it a crime to attempt to obstruct the due administration of justice: Section 135, Penal Code."

Were this *not true*, it is difficult to understand why the same Congress which enacted the law under which this prosecution is brought, so amended the act less than a year thereafter as to *specifically include* therein *attempts to obstruct*. The amendatory act was approved May 18, 1918 (Fed. Rep. Advance Sheets, Vol. 249, No. 4) and follows; that portion of the original Section 3, which was carried into the amended section appearing in black, and the new matter added being shown in red:

> An Act to amend Section 3, Title I of the act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish

espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

That Section 3 of Title I of the act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, be, and the same is hereby, amended so as to read as follows:

"Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall wilfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States, and whoever, when the United States is at war, shall wilfully cause,

or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, (*) and whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall wilfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall wilfully display the flag of any foreign enemy, or shall wilfully by utterance, writing, printing, publication, or language spoken, urge, incite, or ad-

*"to the injury of the service, or of the United States" *eliminated entirely* in amended Act.

vocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall wilfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both: Provided, that any employee or official of the United States Government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy or the flag of the United States shall be at once dismissed from the service. Any such employee shall be dismissed by the head of the department in which the employee may be engaged, and any such official shall be dismissed by the authority having power to appoint a successor to the dismissed official." Approved May 16, 1918.

Because of the recent enactment of the section involved in this case, counsel for plaintiff in error have been able to find but few reported cases bearing upon the question of what constitutes an obstruction to the recruiting or enlistment service. It is of interest, however, to note that in the case of *United States v. Carroll*, which was a contempt proceeding heard by District Judge Wolverton, sitting in the District Court of the District of Montana, reported at 147 Fed. Rep. 947, and in which the defendant Carroll was proceeded against under the provisions of Section 725, U. S. R. S. for obstructing the administration of justice, it was held that

> "The act complained of must have the *direct effect within itself to obstruct or impede* the administration of justice (147 Fed. Rep. 953)";

and that

> "A bare attempt, without success, to induce a third person to do what he could to influence jurors in a pending case in a federal court, did not obstruct the administration of justice, so as to constitute a contempt, punishable under Rev. Stat., Sec. 725, under the rule that, to constitute such contempt, the act done by the accused must naturally and directly tend to such obstruction" (Syllabus),

following the holding of Judge Krekel in the case of *United States v. Bittinger*, 24 Fed. Cas. 1149, and the later case of *United States v. Seeley*, 27 Fed. Cas. 1010. In the latter case it is said:

> "To 'obstruct,' independent of the acceptation the word has obtained in the criminal law, would seem to stand *ex ri termini* a direct and positive interposition, which prevented, or tended to prevent, the action of the officer or court in respect to a matter then to be proceeded in. 'Impede' must necessarily bear a similar import, and, if there be any discrimination between the two terms, it can only be that the same direct and positive interference may, without amounting to a complete obstruction, become an impediment to the action intended to be intercepted. The intention of the Legislature to give these terms an application only to direct acts of violence or menace is inferable from the construction that the endeavor is made equally criminal with the entire completion of the purpose. An endeavor to obstruct or impede, etc., by threats or force, would necessarily imply the effort to put forth some act, which in its natural, if not necessary, consequence, must be attended *with an obstruction*, and with a *forced and compelled interruption of further progress* in the administration of justice."

In the trial of the Ruhberg case the court, in defining the word "obstruct," as it is used in Section 3 of the act approved June 15, 1917, stated to the jury that it meant "to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent in whole or in part," and as used in the indictment did not mean to wholly impede or to block the way. This definition accords with that generally adopted by the courts of the various districts and circuits, and to so much of the instruction we take no exception. The case of the *United States against Ruh-*

*berg*, however, taken in its strongest aspect against him, may best be illustrated by the act of one dislodging a boulder from the side of a canyon, which, instead of finding lodgment in the flowing steam beneath, stops before reaching the bed of the stream, and lays high and dry above the water course. It does not *hinder* the flow of the stream. It does not *impede*, nor *embarrass*, nor *retard*, nor *check*, nor *slacken*, nor *block the way*, nor *prevent* in whole or in part the onward movement of the flowing water. It does not *obstruct*, because at the most, it is but an *unsuccessful attempt at obstruction*.

From the foregoing, and guided by the common dictates of reason, it would seem idle to contend that anything but convincing proof of an *actual and accomplished obstruction* of the recruiting and enlistment service of the United States, as distinguished from proof of an *attempt to obstruct*, will serve to support the conviction of the plaintiff in error of obstructing that service. It is *not enough* to say that the jury has found that plaintiff in error did in fact so obstruct the service. Such a finding *must be supported by evidence*, and none can be found in the record, because no such evidence was adduced in the trial.

The case of *United States v. Hall*, 248 Fed. Rep. 150, hereinbefore cited, and the only case to be found in the Federal Reporter where the questions here presented were squarely passed upon, is as like

the *Ruhberg* case as two peas. The defendant Hall, "at divers times, in the presence of sundry persons, some of whom had registered for the draft, declared that he would flee to avoid going to the war, that Germany would whip the United States, and he hoped so, that the President was a Wall Street tool, using the United States forces in the war because he was a British tool, that the President was the crookedest ——— ever President, that he was the richest man in the United States, that the President brought us into the war by British dictation, that Germany had right to sink ships and kill Americans without warning, and that the United States was fighting for Wall Street millionaires and to protect Morgan's interests in England. . . . It appears the declarations were made at a Montana village of some sixty people, sixty miles from the railway, and none of the armies or navies within hundreds of miles, so far as appears. The declarations were oral; some in badinage with the landlady in a hotel kitchen; some at a picnic; some on the street; some in hot and furious saloon arguments." The Ruhberg record shows no more objectionable statements made by plaintiff in error than those of Hall, *if* they are *as objectionable;* and the Montana court having reached the conclusion, however reluctantly, that the Espionage Act construed in the Hall case meant *only exactly what it said*, could take no other course but that of directing a verdict

for Hall of not guilty. And if the Espionage Act of June 15, 1917, *does* mean what it says, and that only, and if Judge Bourquin *is correct* in so concluding, then it would seem that the *real* misfortune of Julius Ruhberg, for which he must pay by fine, penitentiary imprisonment, loss of citizenship, and probable internment after the expiration of his penitentiary sentence, should he live through that period, is the misfortune of having been indicted and tried in the District of *Oregon*, and not in the District of *Montana*.

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The necessity of establishment by convincing evidence of the fact of *injury* to the enlistment or recruiting service of the United States was earnestly urged upon the trial court at the conclusion of the trial, in connection with the motion of plaintiff in error for a directed verdict, and thereafter in his motion for a new trial. It is hard to believe that there should be in the minds of this court any doubt that "injury of the service or of the United States" is one of the three elements of the offense as defined by the statute, and as charged in Count IV of the indictment, and *must* be proved and sustained by the same measure of evidence required to establish other necessary elements of this statutory crime. Furthermore, it is submitted that the question of injury is one of *fact*, and *for the jury*, and not, as assumed by the trial court, a question of

*law* to be determined by the court. Had there been *any evidence* offered in the course of the trial of injury to the recruiting or enlistment service, either directly resulting or even remotely chargeable to any acts or words of plaintiff in error, that question of injury might and should have been given to the jury under proper instructions. But in the face of the avowal of *every witness* produced against plaintiff in error that *no injury* had resulted, and the absolute failure of the Government to offer any proof of injury whatsoever, the court was clearly in error in refusing to give the instruction requested by Ruhberg, and set out herein as the fifth assignment of error of this plaintiff.

The words "to the injury of the service or of the United States" appearing in the third section of the Espionage Act as approved June 15, 1917, are conspicuously absent from this section of the act as it is amended. The original and the amended section were enacted by the same Congress, no congressional elections intervening between the dates of passage and approval. The clause meant something, or it would not originally have been inserted. It meant something, or it would not subsequently have been eliminated. If it meant anything, it meant *exactly what it said.* It is repugnant to no other provision of the section, nor does it appear in terms complex and difficult of understanding. The usual and universally accepted rules of statutory construction

require this court to give it effect, and it cannot be given effect, and the judgment of conviction be allowed to stand. Had the cause been a civil one, and proof of damage or injury necessary to a recovery by plaintiff, no court in the land would have permitted it to go to a jury upon a record so wholly empty of *proof of injury* as is the record in this cause. In a criminal case, requiring a strict construction of the statute against the plaintiff; strict proof of every averment of the pleading; and a measure of proof infinitely greater than that required in civil causes, how can it be said upon the record in this case that plaintiff in error obstructed the recruiting and enlistment service of the United States *to the injury of that service and of the United States?*

III.

Error of the court in overruling the motion of defendant for a directed verdict of not guilty of the offense charged in Count IV of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant.

IV.

Error of the court in failing and refusing to direct a verdict of not guilty of the offense charged in Count IV of the indictment by reason of variance between the charge made in said count and the evidence and proof submitted to sustain such charge against defendant.

VI.

Error of the Court in refusing to give the jury the following instruction:

> "I instruct you, gentlemen of the jury, that before you can find the defendant guilty of the charge preferred against him in the fourth count of the indictment, you must find that the statements charged in that count to have been made by him, or some of them, were made substantially in the form alleged, in the presence of both Luther Davis and William Mitchell, and since it conclusively appears by the testimony of both the Government and the defense that no such statements or any statements were made by the defendant since the Espionage Act became a law, in the presence of these two men, you must find a verdict of not guilty upon this count of the in-

dictment. It is incumbent upon you to try this defendant solely upon those charges preferred against him in this indictment, and if at times other than those mentioned in the indictment he has violated some law of the United States, he cannot in this trial be tried or convicted of such other offenses."

Count IV of the indictment must be read as charging Ruhberg with making the statement therein set forth to both Mitchell and Davis at the same time and place, or if a continuing offense, at the same times and places. In no other way can it be saved from the fatal error of duplicity. It was so considered upon the trial, and, upon the testimony of the witness Mitchell (Transcript, 64) and the witness Davis (Transcript, 146) that neither of these men had ever at any time discussed war questions or anything else with plaintiff in error Ruhberg in the presence of the other, counsel for plaintiff in error insisted and still insists that the record shows a fatal variance.

The defendant in a criminal cause, where conviction carries severe penalties, is entitled to be advised of the charges made against him by a pleading clearly, accurately and concisely stating to him the time, the place and the manner in which he has violated the law. If Ruhberg or his counsel had been assured before the trial by Mitchell or Davis or both of them that he, Ruhberg, had on no occasion between the dates named in Count IV of the

indictment made to or in their hearing the statements therein charged, would not they be justified in assuming, and proceeding to trial upon the theory, that the indictment referred to and charged some other and different offense than that for which he was really tried? Or that, in the very statements of both Davis and Mitchell, he had a good defense to that count of the indictment? The Government machinery for the investigation of apparent law violations is far-reaching and all-powerful. Some months intervened between the arrest of Ruhberg and the return of the indictment against him. There was ample time and every facility for a full and exhaustive investigation, which would have enabled the prosecuting officers of the Government to have advised this man definitely, clearly and concisely of the charge upon which he was to face trial. There is no justification in fact or in law for a *blanket* indictment such as is found in Count IV, drawn, like a mantle of charity, to cover a multitude of unproven sins; evidently drafted to meet any contingency arising in the trial; and *wholly failing* to accurately or definitely advise the accused of the time, place or nature of the acts concerning which proof was offered. It is as unfair to convict this plaintiff in error of a charge wholly different from that made in the indictment, as to convict him of an offense which he never committed, and it is submitted that the denial by the court of the re-

quested instruction of plaintiff in error of a verdict of not guilty, by reason of variance between the *allegata* and the *probata,* constitutes reversible error.

VII.

**Error of the court in overruling the objection of the defendant to and receiving in evidence and in permitting the witness Luther Davis to testify to statements made to him by defendant, and conversations had between him and defendant, upon subjects relating to the war, and had and made prior to the entry of the United States into the war.**

Over the objection of counsel for plaintiff in error, and exception allowed and taken, the Government witness, Luther Davis, was permitted to testify to conversations had with and statements made to him by plaintiff in error early in the spring of 1917, and prior to a declaration of war between the United States and Germany. He testified that on this occasion Ruhberg had said that he

> "could get no letters from his wife in Germany because of the censor, and blamed the English for that; that the English got ammunition from Americans, and Germany couldn't get anything, that we were sending ammunition to kill the Germans with and had no business doing that; that the United States had no business interfering with the allies, and that we never had been neutral; that Germany was a fine country, far superior to the United States; that you had more freedom and could get anything you wanted, whiskey or wines, or anything you wanted there; that you couldn't get anything you wanted here any more; that he had been in the German army about three years, and had been in the Franco-Prussian war; that the training of the German army was far superior

to the American army; that he was in the German cavalry training, and told what a fine horse he had, and what fine training he went through; that Germany was perfectly right in sinking the Lusitania; that ships carrying contraband of war with passengers on them who had no more sense than to ride in time of war, ought to be sunk; that if this country got into the war, Germans in this country would rebel against this Government; that this country was in no shape to fight the German government; that we were so slow that Germany would have the allies licked before we got ready to fight, and then come to the United States; that Germany was in the right, and she was bound to win, and that the German government always took the right side to everything; that they never had lost a war and they never would."

These statements charged by Davis to have been made by plaintiff in error were, if made at all, merely expressions of opinion upon questions being generally discussed by our press and public at that time. It was no offense at that time, when our nation was maintaining a position of neutrality between the fighting nations of Europe, to either entertain or express a sympathy with any one of the belligerents. For years before the entry into the war of the United States, the larger nations at war had been spending millions of dollars in campaigns of advertisement and education for no other purpose than to secure the sympathy and moral support, and the good wishes of the people of neutral nations, particularly the American people. The

earlier reports made public by the German nation of its war movements were invariably accurate, and not knowing then, as we knew later, and know now, the depths of duplicity and untruth which were sounded by those having in hand for the German nation its campaign for the support by the people of this country of its war aims and purposes, it may readily be believed that any of these statements made by plaintiff in error were made in a sincere and honest conviction of their truth, and without criminal or wrongful intent. Our armies are full today of splendid fighting men of German extraction, who are doing their utmost to preserve to the world rights of liberty and equality, whose loyalty is unquestioned, and yet whose sympathies, before the entry of the United States into the war, were unquestionably with the German arms. The plaintiff in error was born on the borders of Germany, of German parents, received his education in German schools, and had military training in the German army. Furthermore, he had had relatives in the German army, fighting against France and England on the Western front, and at the time of the trial testified that one of his nephews was then a war prisoner in a British camp. As between Germany and any nation other than the United States, it would be strange to find or to expect to find his sympathies elsewhere than with Germany; or to find him anything but humanly ready to believe the

lies of German publicity agents, sent broadcast over the world in an attempt to justify the sinking of ships carrying defenseless women and children, and the other and many defenseless and unlawful war measures adopted by that nation.

Any statements made by Ruhberg to the witness Davis early in the spring of 1917, and prior to the entry of the United States into the war, could not have been made with the unlawful purpose denounced by Section 3 of the Espionage Act, because at that time obstruction of the recruiting or enlistment service of the United States was not an offense. Such statements as are charged by Davis to have been made by Ruhberg in the early spring of 1917 could not but operate to greatly prejudice the trial jury against him. They were, if admissible in evidence at all, admissible for but one purpose and upon but one theory, to-wit, to show intent of plaintiff in error as concerns subsequent acts and statements. Because of the fact that statements made at the time and under the circumstances these are charged to have been made, did not, and ordinarily could not truly tpyify the state of mind of Ruhberg after his adopted country became involved in the European war, it is contended by counsel for plaintiff in error that this evidence should not have been admitted and having been admitted, and being of a character highly prejudicial, constitutes reversible error. Ruhberg testi-

fies (Transcript, 125-126-131-132-133) that only by degrees did he become convinced that Germany was wrong, and the United States justified in entering the war, and this court must know in its broad knowledge of human nature and affairs, that he is but one of untold thousands of German-born American citizens who regretted the entry of the United States into a war against Germany, but who today are better and more loyal American citizens than many of our native-born, having no blood ties with, and held by no bonds of sympathy to enemy countries.

VIII.

**Error of the court in overruling the motion of the defendant for arrest of judgment by reason of the failure of Court IV of the indictment to state facts sufficient to constitute an offense against the United States.**

After the verdict of conviction, and prior to judgment and sentence, plaintiff in error filed in the trial court a motion for order in arrest of judgment, for the reason that Count IV of the indictment fails to state facts sufficient to constitute an offense against the United States, in that, first, that count of the indictment wholly fails to allege the intended recruiting or enlistment in the military or naval forces of the United States of William Mitchell or Luther Davis, or any other person whomsoever, and second, that said count of the indictment wholly fails to allege or charge plaintiff in error with knowledge or notice of the proposed or intended enlistment or recruiting in the military or naval forces of the United States of William Mitchell or Luther Davis, or any other person whomsoever.

The motion of plaintiff in error for arrest of judgment was overruled by the trial court, and exception taken and allowed.

If what is declared by the United States Supreme Court in the case of *Pettibone v. United*

*States*, 148 U. S. 197, 206, to be the law governing indictments charging *obstruction of* the due administration of *justice* is applicable to charges of *obstruction of* the *recruiting or enlistment* service, the indictment is fatally defective. It appears from the report of this case that Pettibone and others were indicted for conspiracy to obstruct the administration of justice in a court of the United States, and upon trial, convicted and sentenced to imprisonment. The indictment in the *Pettibone* case failed to allege the pendency of the proceeding in the federal court with the obstruction of which Pettibone was charged, and likewise lacked any averment of notice or knowledge on the part of Pettibone of the pendency of any such proceeding. In the opinion of the court, written by Mr. Chief Justice Fuller, it is said (206):

> "It seems clear that an indictment against a person for corruptly or by threats or force endeavoring to influence, intimidate or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court, unless it appears that he knew or had notice that justice was being administered in such court."

There is no allegation in Count IV of the indictment that either Mitchell or Davis, or any other person referred to therein, were being recruited or enlisted by the United States for military service. There is no charge made in the indictment that the accused had knowledge of the intended recruiting or enlistment of these persons. It will not be seriously contended that *intent* is not an element of the offense with which Ruhberg is charged, in view of the general holding of the courts that the term "wilfully," when used in a criminal statute, means more than "voluntarily," and implies and imports a *criminal intent* to purposely do a wrongful act, and in view of the allegation of intent in the indictment. Upon reason, the same requirements obtaining in an indictment charging obstruction of the due administration of justice in a court of the United States apply with equal force to an indictment charging a willful obstruction of the recruiting and enlistment service of the United States. We therefore submit that the case of *Pettibone v. United States* is in point, and is controlling, and this being true, the conviction must be reversed and Count IV of the indictment quashed.

Upon this point the case of *United States v. McLeod*, Dist. Court, District of Alabama, 119 Fed. 416-418, is of interest. This likewise was a charge of obstructing the administration of justice, and in

sustaining the demurrer to the indictment it is held that

> "Justice can be obstructed or influenced only by obstructing or impeding *those who seek justice* in a court, or those who have duties or powers in administering justice therein."

Neither Davis nor Mitchell were *seeking enlistment* in the military forces, nor was the United States particularly seeking through its officers to recruit them. The indictment carries no allegation to that effect, nor any allegation of notice or knowledge of such fact on the part of the accused; and if it did, the record discloses no *proof* of such conditions.

## IX.

**Error of the court in overruling the motion of defendant for an order setting aside the verdict and judgment of conviction and granting defendant a new trial.**

We are aware of the fact that motions for a new trial are addressed to the discretion of the trial court, and that no review may be had of a denial thereof, except in cases of patent abuse of that discretion. The questions of law herein presented to this honorable court were fully presented to, and the rights of plaintiff in error urged upon the trial court at the time the motions for a new trial and in arrest were heard. We now contend that the trial court, being fully advised of the errors permitted and committed in the trial, and refusing to exercise his discretionary powers and grant to plaintiff in error a new trial, has grossly abused that discretion; and this being so, his action is properly before this Appellate Court for review.

The re-assembly of the errors appearing in the record of the Ruhberg trial, and discussed in the foregoing pages, with a re-argument thereof, will serve no useful purpose. Let it suffice to say that from the record in this cause it conclusively appears that plaintiff in error has been convicted of a crime he did not commit. He has been convicted of obstructing something which it is conclusively shown was not obstructed. He is convicted of

causing an injury which is not proven by so much as a shadow of evidence of injury. He was tried at a time when public opinion was aroused to the point of demanding conviction of everything German; when the very name of Germany was synonymous with crime. His offense, if one was committed, was that of entertaining or expressing opinions upon questions of national and foreign policy which did not conform with those of his neighbors. It may have been a moral crime, or even a political crime, but it was not a crime by force of statute, and the right to punish for it lies not in the federal courts. He has not gone about seeking out our present or prospective soldiers, preaching to them the principles of sedition or disloyalty. He is not a stealthy frequenter of our training camps and cantonments. During all his years in the United States, he has been found only in those places where his lowly labors of shepherd and farmer have properly taken him. He has not gone about burning our wheat fields, wrecking our industrial plants, furthering by destructive acts the war program and policies of our enemies. He is not an anarchist. He is not an I. W. W. He is not a German spy, and he has not violated our espionage laws. He is simply what the record shows him, an old man whose entire life time has been spent with his herds and flocks in mountain ranges, in sage brush, in wheat fields; an old man whose only offense was that he talked too much; who had trouble in Ger-

many because he had become a free thinking American citizen; who, upon returning to the United States to escape the evils of Prussianism, has by the same methods of invidious comparison, and humanly natural, if ill advised, boastings of the personal rights enjoyed by residents of his mother country, and pride expressed in the prowess of the armies of which he was once a unit, brought upon himself the persecution of the authorities of the land of his adoption.

He is an old man. His honesty and good conduct is vouched for by some of the best citizens of his community. The rigors of winters spent in the mountain fastnesses of Central Oregon sheep camps have laid heavy toll upon him. The snows and cold, the physical hardships and discomforts which are necessarily incident to the paths of endeavor he chose to tread have left him broken in health. He does not know today if his wife is alive or dead. He faces the almost certain prospect of finding his life's savings, with what he should have received from his father's estate, confiscated by the German government because of his American citizenship. He has gone through two costly trials, which, with his other troubles, have left him broken in spirit. And because he preferred the United States to his mother country, and yet could not wholly forget the past, only his appeal to this honorable court stands between him and the swinging gates of the peniten-

tiary. He is not invoking a strained or technical construction of the law. He asks of this court simply that he be not convicted of and punished for an offense he is not shown to have committed. He is asking of this court only that protection of the law which, as is said by Mr. Justice Field in the case of *Wong Wing v. United States*, 163 U. S. 242-243, is the right of every man, rich or poor, citizen or alien, white or yellow, who shall be domiciled within our borders. He is asking justice; no more; no less; that fair and impartial hearing of which the great French Cardinal, Richelieu, so nobly boasted had been by him denied to no man. "For fifteen years," such were his words, "while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very lepers shrinking from the sun, though loathed by charity, might ask for justice."

With the sincere belief that the appeal of plaintiff in error to this court will not be for him a vain and idle proceeding, this brief is

Respectfully submitted,

RIDGWAY & JOHNSON,
G. G. SCHMITT,
Attorneys for Plaintiff in Error.

(In all extracts or quotations from reported cases the italics are presumably ours.)

No. 3196

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JULIUS RHUBERG,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

## Brief for Defendant in Error

**Upon Writ of Error to the United States District Court for the District of Oregon**

BERT E. HANEY,
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## STATEMENT.

The indictment in this case is drawn in four counts, each charging a violation of the Espionage Act of June 15, 1917, and all based upon the making by the defendant of the following utterances:

1. That the moneyed men had caused the United States to enter the war against Germany.
2. That Germany was in the right and the United States was in the wrong, and that he, the said defendant, hoped Germany would win and that Germany was sure to win.
3. That the best thing they, meaning the said men of registration age and subject to draft could do when in battle, would be to put up their hands and let the Germans take them prisoners.
4. That one German could lick ten Americans.
5. That the United States was so slow that Germany would have it whipped before it, the United States, got ready for war.

6. That the United States had no business in the war and ought not to have gone into it.

The jury returned a verdict of guilty as to Count 4 of this indictment and not guilty as to Counts 1 and 2 of the indictment. Count 3 was dismissed, upon motion of the Government, before trial.

The issue is, therefore, narrowed down to a construction of Count 4 of the indictment, and to a determination as to whether there is any error in the record upon which the jury based its verdict of guilty.

Count 4 of the indictment charges the defendant with having wilfully made the statements above set out, to and in the presence of William Mitchell, Luther Davis and others to the Grand Jury unknown, with the intention of obstructing the recruiting and enlistment service of the United States, to the injury of the service of the United States, at a time when the United States was at war with the Imperial German Government. It is charged in the indictment that this language was uttered between the first day of June, 1917, and the first day of January, 1918, the exact dates being unknown to the Grand Jury.

This Count in the indictment is based upon the

third clause of Section 3, Title 1 of the Espionage Act, which reads as follows:

> "Whoever, when the United States is at war * * * shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine, etc."

**ASSIGNMENTS OF ERROR 1, 2, 3 and 4.**

These assignments of error are all predicated upon the fact that the Court denied the defendant's request at the close of all the evidence, to direct the Jury to return a verdict in his favor, thereby presenting but one question, and that is, whether or not there was any substantial evidence at the trial of his guilt. Under these assignments, it is also contended that there was a fatal variance between the charge made in the Fourth Count and the evidence and proof submitted. This point will also be discussed under assignment of error 6.

LUTHER DAVIS, called by the Government as a witness to sustain the charge alleged in Count Four, testified that he was 22 years of age; was married and lived and farmed at Kent, Oregon; that he had duly registered on June 5, 1917; had been classified, but had not yet been called into the service: that he had known the defendant for

about three years; that he had discussed the war with defendant prior to our entrance therein and in particular in the spring of 1917, at which time the defendant, among other statements, took occasion to say:

That the United States was sending ammunition with which to kill the Germans.

That the United States had never been neutral and had no business in sending ammunition to England.

That Germany was perfectly right in sinking the Lusitania and that ships carrying contraband of war with passengers on them, who had no more sense than to ride in time of war, ought to be sunk.

That if this country got into the war the Germans in this country would rebel against this Government.

That this country was in no shape to fight the German Government.

That the training of the German Army was far superior to the American Army.

That Germany was a fine country and one enjoyed greater freedom in that country than in the United States.

(Trans. p. 52-53.)

Questioned particularly as to what statements were made by the defendant after our declaration of war with Germany, the witness testified that in August, 1917, the defendant told him of a Mr. Von Borstel, a naturalized citizen of German birth and descent, having seen some troops in The Dalles, Oregon, and that they handled a gun like a kid. The witness further testified that defendant said that Germany was in the right and that it was bound to win; that the Germans always took the right side of everything; that they had never lost a war and never would. It does not appear in the bill of exceptions as to the particular date when this last conversation took place. (Trans. p. 53-54.)

However, it is made clear in the transcript that the following conversation did take place some time in November, 1917, and subsequent to our entrance into the war. This occurred during a visit made by the witness to the home of the defendant at the Mackin ranch, on which occasion the witness testified to having seen on the wall therein the Kaiser's picture and the German flag. It was at that time, according to the testimony of the witness, that the defendant made the following statements:

1. That this country had no business and no cause whatever to be in the war.

2. That the moneyed men and the men of the shipping interests and men around those big steel factories in the East, making ammunition, were the men that had brought us in the war.

3. That defendant would not advise any man that did not have a surplus amount of money, to invest in Liberty Bonds. That in a couple of years they would go down; that probably they would not be worth 25 per cent under par.

4. That defendant advised witness not to enlist.

5. That witness should not go into the army until he was drafted, for if a bullet did not kill him, he would die of sickness on account of so many dead people.

6. That Germany had a fine army.
(Trans. P. 54.)

It further appeared from the testimony of this witness that the effect of these conversations prior to the war upon him, was to cause him to begin to think that Germany was in the right; that the

United States was not neutral in sending ammunition to the Allies and that the sinking of the Lusitania was justifiable; that, however, the conversations had with him subsequent to our entrance into the war did not have much effect as he had been talking to other people and that it put him to thinking.

Questioned by the Court, the witness testified that the defendant appeared to be very much in earnest at the time of his last conversation about the war and appeared to try to impress upon the witness what he said. (Trans. P. 55.)

WILLIAM MITCHELL, the other person mentioned in this count of the indictment, testified that he was 34 years of age; that his business was farming and that he lived at Kent, Oregon; that he had known the defendant for two years; that some time in June, 1917, somewhere between the 5th and the 20th, he could not say exactly for sure, the defendant had a talk with him about the war, at which time the defendant made the following utterances:

1. That this country had no business in the war against Germany.

2. That the rich men caused this war, and it was, therefore, a rich man's war and

not that of the working people.

3. That we were wrong in entering the war as it was not our fight.

4. That this country would be helpless anyway—that before we could do any good the Western front would be taken, and the French and English whipped.

5. That it would take ten Americans to stand off one German.

(Trans. P. 63.)

It is, therefore, quite evident from the resume of the above testimony that the record does contain substantial evidence of the charge in this count of the indictment and warranted the Court in refusing the defendant's motion for a directed verdict.

With respect to defendant's contention that the testimony of William Mitchell was confined to a conversation had with defendant prior to the passage of the Espionage Act, it will be noted that the witness fixes the time as between June 5th and June 20th, 1917. The Espionage Act was approved June 15, 1917, thereby submittting an issue of fact for the jury to determine as to whether the conversation was had prior or subsequent to the passage

of this Act.

At any rate, it must be conceded that the testimony of Luther Davis, even if standing alone, would be sufficient to substantiate the charge made and to warrant its submission to the jury, so far as this assignment of error is concerned.

It is further argued that there is a variance in the charge of the indictment and the proof, as to the utterances having been made to and in the presence of Luther Davis and William Mitchell. While it may be true that the record discloses that the defendant made these statements, not in the presence of both Davis and Mitchell, but to each of them, on separate occasions, the variance in the proof, if it can be considered such, is not fatal, but immaterial, as proof was offered to show that these statements were in fact made to and in the presence of one of the persons mentioned in this count of the indictment.

The essential inquiry is, did the defendant wilfully use the language imputed to him, or some substantial part thereof, in the presence of both or either of them, or of other persons to the Grand Jury unknown, if any. (See Court's Instructions, Trans. P. 155.)

As bearing upon the motive and intent of the

defendant, it was competent for the Government to prove and for the jury to consider in determining the guilt or innocence of the defendant of the charge in Count 4 of the indictment, the following testimony offered by the Government:

CORLISS P. ANDREWS testified that he was 25 years of age and married to a girl of German parentage; that he had registered for military service and was subject to draft; that during the winter of 1914 and 1915 the defendant told witness:

> "That this country had no business shipping ammunition over there."
>
> "That we were not neutral so long as we did that."
>
> "That England was trying to shut Germany out of commerce on the seas, and trying to keep them down."
>
> "That the German people had more rights than the American people did, and that they were governed better."
>
> "That Germany was justified in using submarines because we had no business shipping ammunition over there and that was the only way they could stop it."

(Trans. P. 36.)

The witness further testified that after our entrance into the war, and particularly during the fall of 1917, probably in November, after he had registered and was awaiting a call into the service, the defendant, knowing that the witness had registered, told him the following:

1. That if he, the witness, was taken over to France and was in battle and got in a tight place, to throw up his hands and let the Germans take him prisoner.
2. That this country was so slow, that Germany would have us whipped before we got ready.
3. That Germany was in the right and the United States in the wrong, and that he, the defendant, hoped Germany would win and that it was sure to win.
4. That the moneyed men had caused the United States to go to war and that we had entered the war in order to get out money that we had loaned out.
5. That one German could lick ten Americans.
6. That the stuff that was in the papers

about Belgium atrocities was all lies; that they were just trying to stir up the people.

7. That if the United States kept in the war for two or three years, the Liberty Bonds would not be worth more than 25c or 50c on the dollar.

(Trans. P. 37.)

Questioned as to what effect the statements of Rhuberg made upon him prior to our entrance in the war, the witness testified that the defendant made him believe that Germany was in the right and was justified in doing some of the things that were being done; that the United States was not neutral and was aiding England against Germany. He further believed that the statements were made by Rhuberg to him for the purpose of discouraging him from going to war. (Page 39.)

MRS. LUTHER DAVIS, the wife of Luther Davis, testified that she was born in the United States, of German parents; that some time in the summer and fall of 1917, she being present, she heard the defendant tell her husband, Luther Davis, as follows:

1. That he should not enlist, because if he did enlist and did not get killed by Ger-

man bullets, he would die of some disease.

2. That anybody that would ride on the Lusitania, while the war was going on and it was carrying ammunition, ought to get killed.

3. That it was the rich people that were causing this war.

4. That the defendant was going back to Germany just as quick as the war was over.

5. That the defendant did not like America and was going back to Germany to live. (Trans. P. 58.)

The witness further testified that the defendant appeared to be embittered against this country. (Page 58.)

RAY SPROUL testified that he was 34 years of age and lived at Kent, Oregon, where he was engaged in farming; that some time in October or November, 1917, he had a conversation with the defendant, at which time he commented that they were certainly blowing up things in Europe, concerning which the witness testified as follows:

"Mr. Rhuberg, he says, 'That is just what

the Germans want.' 'Why,' I says, 'I should think it would make food short over there.' 'Well,' he says, 'It is all on French and English ground.' And I says, 'Well, that will probably change when the American soldiers get over there.' And he says, 'No, No,' he say, 'they will never step foot on German soil. One German is equal to a dozen Americans.' "

(Trans. P. 60.)

REVEREND TRUEBLOOD SMITH testified that he was the pastor of the First Presbyterian Church at Moro, Oregon; that on June 20, 1917, he met the defendant at the latter's ranch, while on his way to attend a Red Cross meeting held in Kent, concerning which the witness testified as follows:

"Q. What did he say with respect to the funds for the Red Cross, as to the necessity of the Government?"

"A. Well, one of the first questions was when he said 'What are you folks out here for? Do you wish funds for the American Red Cross?' He says 'You have no wounded soldiers.' He says, 'I support the German Red Cross Society, for we have many

wounded soldiers, and need for funds.' "

* * * *

"Q. And he said 'We have wounded'?"

"A. He says 'We have many wounded soldiers, and need for funds.' He said, 'I support the German Red Cross Society.' "

(Trans. P. 68-69.)

The witness further testified that the defendant at the time of this conversation also told him the following:

1. That we had no reason whatever for going to war with Germany.
2. That the Germans sunk the Lusitania and other vessels because they were lending aid to the enemies of Germany.
3. That the trouble with the United States is that this government will not permit its people or the papers to publish the truth concerning Germany. If so, the American people would not fight Germany, if they but knew the truth concerning Germany.

(Trans. P. 68.)

The salient features brought out in the exam-

ination of Julius Ruhberg, the defendant, indicate that he was born in 1861 in Schleswig-Holstein, then a Danish province, but ever since August 23, 1866, under German rule; that he had resided thereat until 1873, when he moved to Hamburg, Germany, where he attended school; that he served three years in the German Army; that in 1884 he came to the United States, where he took up ranching in Nevada and Oregon; that he forswore allegiance to Germany and became naturalized as an American citizen on June 27, 1889; that in 1900 he returned to Germany, where he married and came back to the United States with his wife that same year; that in 1904 he again returned to Germany with his wife, where they continued to live and remained continuously until 1913, just before the outbreak of the world war, when he left his wife in Germany, coming back alone to the United States and taking up a ranch belonging to one Von Borstel, near Kent, Oregon; that he brought with him at that time the picture of the Kaiser of Germany, which later adorned his place of residence and which he permitted to remain until even after our participation in the war; that he is worth about $20,000, $19,000 of which is in Germany; that he contributed nothing to the Red Cross or to any issues of the Government's Liberty Loans,

except one subscription for $100, which was made just prior to the trial. (Trans. P. 115.)

The following testimony was elicited from him by the Court:

> "Q. At the time this Government went to war with Germany on April 6, 1917, did you or did you not regret that this Government should take a hand in the war?"
>
> "A. Yes, your Honor. You see, certainly, I am born in Schleswig-Holstein, I hated to see that it had to come to it."
>
> "Q. You regretted that this Government should go to war with Germany, your own country?"
>
> "A. You see, while it may be no way out of it——"
>
> "Q. Answer the question."
>
> "A. And we have to do our duty, as we do our duty to this country, even if it was hard."
>
> "Q. Well, then, you regretted that this country should go to war with Germany?"
>
> "A. Yes sir."
>
> (Trans. P. 125-126.)

One of the defendant's own character witnesses, L. BARNUM, testified that while he knew the defendant as between 1900 to 1903, he knew nothing about the defendant subsequent to that time and further testified that as County Chairman of the State Council of Defense, he had received during the latter part of 1917 and 1918, some twenty-five complaints attacking the loyalty of the defendant. (Trans. P. 141.)

Summarizing the entire testimony before the jury, it could not seriously be argued that there was not any substantial testimony to support the verdict of guilty.

**ASSIGNMENT OF ERROR 5.**

This error is predicated upon the refusal of the Court to give the following requested instruction:

> "Counts II and IV of the indictment, while charging distinct violations by the defendant of the statute known as the Espionage Act, in that the statements alleged to have been made by the defendant Rhuberg, and set forth in these counts of the indictment, were made at different times, and to different persons, are yet largely identical in character. They are both drawn under the same provision of the statute, a provis-

ion which makes its unlawful for any person while the United States is at war with any foreign power, to wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service, or to the injury of the United States. You will therefore note that there are three elements which must be proven before a verdict of guilty may be rendered upon either of these counts of the indictment. First, there must exist the state of war mentioned; second, there must be a wilful obstruction of recruiting or enlistment; third, there must result an injury to the recruiting or enlistment service, or to the United States. I instruct you, gentlemen of the jury, that if the Government has failed to prove to your satisfaction, and beyond a reasonable doubt, any one of these three elements of the offense charged in Counts II and IV of the indictment, your verdict must necessarily be as to these counts a verdict of not guilty. And since the Government has not shown that the statements charged in Counts II and IV of the indictment to have been made by the defendant Rhuberg did in fact result in any injury whatsoever, either to the recruit-

ing or enlistment service of the United States, or to the United States, your verdict upon Counts II and IV of the indictment must be verdicts of not guilty."

The Court had previously instructed the jury upon the law of the case as follows:

"We next turn to the declaration of the act, 'Whoever when the United States is at war shall wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service of the United States.' To obstruct in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent in whole or in part, and, as used in the indictment, it means active antagonism to the enforcement of the Act of Congress, that is, the act providing for the recruiting and enlistment service of the United States. The word does not mean as here used to wholly impede, or to block the way. It is sufficient that the act tends to hinder or to make it harder or more difficult for the Government to progress with the work of recruiting or enlistment of men into the service. Whatever has this effect works to the injury and

damage of the Government. The injury follows as the necessary and logical effect and sequence of the act of retarding or making it harder or more difficult for the Government to act and carry forward the work of recruiting and enlistment. No other or more specific injury to the United States than this is necessary or required to be shown.

"Having defined these offenses, so denounced by statute, you will appreciate how essential it is for the successful prosecution of the war that none of these evils shall possess the men of the country subject to the selective draft, and that no obstruction shall be interposed in any way to impede, retard, hinder, or make it harder or more difficult for the Government to recruit and enlist men in the military service; hence there is great and wholesome reason for the statute, and the reason for its rigid enforcement is just as potent and overpowering. Nothing should interfere with the military and naval forces of the United States, nor with the work of recruiting or enlistment of the men that go to make up such forces. Any means employed by which to cause the

evils enumerated, or any one of them, is denounced. You will note that the term wilfully is employed in the statement of the statute as to what will constitute the offense. This means that the acts complained of must have been done with knowledge on the part of the defendant of what he was doing, and that he, having such knowledge, intentionally did the acts and intended thereby, and had such purpose therein, that the result of doing such acts would be to cause insubordination, disloyalty, or refusal of duty in the military service, or would tend to impede or hinder the recruiting and enlistment of men into the service, to the injury of the United States."

(Trans. P. 153-154.)

It is urged by defendant that in order to constitute this offense there must be evidence that the statements made by Rhuberg did in fact actually result in injury to the recruiting or enlistment service of the United States.

That this law requires no such extreme proof in order to constitute the offense, and that the Court correctly stated all the essential elements of the law, is evident from the following interpreta-

tions of this particular clause in the Espionage Act, as reported in the Bulletins issued by the Department of Justice, called "Interpretations of War Statutes." These mainly contain the charges to juries by judges of the various district courts of the United States. Wherever these cases have gone to the appellate court or have been reported, the citations will be given.

Bulletin 4 contains the charge of District Judge Wade to the jury (U. S. D. C. Iowa) in the case of the United States vs. Daniel H. Wallace. Among the statements attributed to the defendant in this case were:

> "That this was a capitalist war. That soldiers were giving their lives for the capitalists. That 40 per cent of the ammunition of the Allies or their guns was defective because of graft."

The Court, in his charge, said:

> "It isn't, of course, now a question of whether he said all of these things just as the Government said he did, but it is a question of whether he said any of them, the natural consequence of which would be that it would obstruct the recruiting and enlisting service of the United States. The Govern-

> ment doesn't have to go out and find a particular individual that was restrained from entering the service of the United States because of this speech; it is sufficient if it has proven that he uttered words there, the natural and probable consequence of which upon the public mind would obstruct recruiting or enlistment, with an intention that it should do so."

Bulletin No. 7 (U. S. Circuit Court of Appeals for the Second Circuit) is the case of Masses Publishing Company vs. Patten, Postmaster, New York City, which is reported in 246 Fed. 38. This came up on appeal from an order of the United States District Court for the Southern District of New York, granting a temporary injunction commanding the defendant to permit a magazine known as the "Masses" through the mails (244 Fed. 535 and 245 Fed. 102). The postmaster had held that this magazine was non-mailable by virtue of the provision of Title 12 of the Espionage Act, which closes the United States mails to any literature in furtherance of the acts denounced by Section 3 of the Espionage Act. With respect to that provision applicable to the case at issue, the appellate court said:

> "That one may wilfully obstruct the en-

listment service without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest seems to us too plain for controversy. To obstruct the recruiting or enlistment service within the meaning of the statute, it is not necessary that there should be a physical obstruction. Anything which impedes, hinders, retards, restrains, or puts an obstacle in the way of recruiting is sufficient. In granting the stay of the injunction until this case could be heard in this court upon the appeal, Judge Hough declared that 'It is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. Oratio obliqua has always been preferred by rhetoricians to oratio recta; the beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction 'Go thou and do likewise.' With this statement we fully agree. Moreover it is not necessary that an incitement to crime must be direct. At common law the 'counseling' which constituted one an accessory before the fact might be indirect." (See Wharton's Crim-

inal Law, 11th Ed., Sec. 266.)

Bulletin No. 15 contains the opinion of District Judge Ray (U. S. D. C. Northern District of New York) upon the demurrer to the indictment in the case of the United States vs. Pierce for distributing a pamphlet entitled "The Price We Pay." This opinion is reported in 245 Fed. 878.

The Court in considering the clause of Section 3 in issue said:

> "But the obstruction need not be physical and all obstruction of such service is injurious to the service of the United States. Obstruction does not necessarily imply prevention. The flowing stream of water may be obstructed, and often is, while its continuous onward flow is not wholly prevented and its ultimate onward flow may not be prevented at all. Any and all acts and words or writings that interfere with the operation or success of the military or naval forces of the United States, and all attempts, successful or unsuccessful, by acts, words, or writings, to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States in time of war, work to the injury of the service of

the United States. When Congress wrote into section 3, above quoted, the words 'or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States' it may have had in mind the hundreds and thousands of cases where fathers and mothers and brothers and sisters will obstruct in a way and to an extent the recruiting and enlistment service by urging and soliciting their sons and brothers not to enlist. No one will contend, I think, that such an act will be held a wilful obstruction of the enlistment service to the injury of the service of the United States within the intent and meaning of section 3 of the act under consideration. But should some person go about soliciting and urging young men not to enlist, extravagantly and untruly depicting the horrors and dangers and consequences of war, impugning the motives and purpose of the President and Congress in declaring war, and misrepresenting the objects sought to be attained by our Government in declaring the existence of a state of war, we have a case where a jury may well find a wilful obstruction of the recruiting or enlist-

ment service of the United States to the injury of the service of the United States even if the Government is unable to prove that a single person was induced by such acts not to enlist when otherwise he should have enlisted.

Bulletin 49 contains the charge of District Judge Wade (U. S. D. C. North Dakota) in the case of the United States vs. Kate Richard O'Hare. The Court said:

"And you must further find that the natural and ordinary result of the language used by her in the manner in which she used it, in the connection in which she used it, would be to interfere with the enlistment or recruiting service of the United States. Here, of course, you have to take into consideration what are matters of common knowledge, that men must go from home, and fathers and mothers must make the sacrifice, that men who enlist are often influenced more or less by the wishes of their parents, and they are influenced more or less by their view of the conditions that they are entering; take all those things into consideration: then take the language used, if you find it was used, as heretofore instruct-

ed, and determine whether or not her purpose and intent was to interfere with men whose minds might be guiding them to enlist, or to interfere with those who might have influence or domination over them, or control over them; in other words, from a practical standpoint, whether or not it would interfere naturally with the number of enlistments, or the number recruited by the recruiting officers. It is not necessary, of course, and not practicable, that the Government should show that some particular person was induced not to enlist by reason of the things charged to have been said. It is sufficient if the things said were said with that purpose, and that they were in their nature such as ordinarily would bring about that result. Then the offense is complete."

Bulletin No. 53 contains the charge of District Judge Lewis (U. S. D. C. Colorado) in the case of the United States vs. Orlando Hitt. The Court said:

"There are many ways that would occur in which the enlistment and recruiting service would be obstructed. It does not have to be stopped. The statute does not mean that; that the obstruction must extend to the

point of actually stopping the whole service. It might be obstructed by taking the registration list and destroying it; by obliterating some names on that list, and by persuading some young men who are on that list and subject to call, to flee the country or to resist being put into the service. It might extend only to one man, but that would be obstruction. So that obstruction in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent, in whole or in part. As used in the indictment it means active antagonism to the enforcement of the act of Congress; that is, to effectively resist or oppose the command of the law, to the injury of the service or of the United States, or by acts or words to intentionally cause others to do so; to interfere or intermeddle in such a way, and to such an extent, as to render more burdensome or difficult the enforcement and the execution of the law, to the injury of the service or of the United States."

To like effect is this same judge's instruction in the case of the United States vs. Pearley Doe, reported in Bulletin No. 55 (U. S. C. D. Colorado). This was a case where the defendant was charged

with mailing circular letters which were alleged to be non-mailable, because it was sought thereby to wilfully obstruct the recruiting and enlistment service.

Bulletin No. 56 contains the instructions of District Judge Lewis (U. S. D. C. Colorado) in the case of the United States vs. W. B. Tanner. In this case the defendant was in the second count indicted for making the following statements with the intent to wilfully obstruct the recruiting and enlistment service:

> "There is no security behind the Liberty Bonds."
>
> "The conservation of food is all bosh."
>
> "As soon as the capitalists on Wall Street have all the money they want, this war will be over in 24 hours."

And in the fourth count for a similar violation by the use of the following language:

> "The Liberty Bonds will only be worth 50c on the dollar within two years."
>
> "The first thing we ought to do right after Congress meets is to impeach that Wilson."

"Talk about being under the Kaiser. Well, it is a whole lot worse over here in this country."

"England and France will be forced to quit."

"The United States will have to come down off her high horse."

The Judge in his instructions upon these two counts said:

"The word 'obstruct,' used in the statute in the definition of the second offense therein set forth, is perhaps of broader significance. This word can be used to apply to different degrees of the same thought or idea. To obstruct means, in its broad sense, to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent, in whole or in part. As used in the indictment it means active antagonism to the enforcement of the act of Congress; that is, to effectually resist or oppose the command of the law, to the injury of the service of the United States, or by acts or words to intentionally cause others to do so. It means to interfere or intermeddle in such a way to such an extent as to render more burdensome or difficult

the enforcement and execution of the law, to the injury of the service or of the United States.

"Your attention has been called in the argument to the constitutional guaranty of free speech, but you are instructed that this guaranty cannot be successfully invoked as a protection where the honor and safety of the Nation is involved. And this statute, which the indictment charges the defendant violated, is a constitutional and proper enactment to safeguard the national honor and safety."

Bulletin No. 76 contains the instructions of District Judge Jack (U. S. D. C. Louisiana) in the case of the United States vs. S. J. Harper. In this indictment the defendant was charged with wilfully obstructing the recruiting and enlistment service of the United States to the injury of the service by the use of the following language:

"This is a poor man's fight and a rich man's war."

"President Wilson and Congress ought to be assassinated."

"My boy and I will take to the woods and

die there before we would go to war."

The Court upon this point charged:

"Two witnesses for the Government, Cupp and Ray, testified that this statement was made in their presence. The defendant, on the stand, denies that he made any such statement. It is for you to determine whose testimony you will believe and whose you will reject in reaching your conclusion as to whether the statement in substantially this form was made. If you find that such a statement was made, then you will have to determine whether or not it obstructed the enlistment and recruiting service. At the time this statement is alleged to have been made the United States was, and is engaged in recruiting and in the enlistment of men under the draft act for service in the Army. If you find that such language was used by defendant in talking to Cupp and Ray, then you should consider whether the natural result of such statements to these parties at the time and under the circumstances would be to interfere with the enlistment and recruiting service of the United States to the injury of the United States, and whether

defendant intended that it should so interfere. If you so find, then you would be justified in concluding that in fact it did so obstruct such recruiting and enlistment service as charged to the injury of the service of the United States."

Bulletin No. 78 contains the instructions of District Judge Cushman (U. S. D. C. Western District of Washington) in the case of the United States vs. Leonard Foster. The Court said:

"Counts 3 and 6 accuse the defendants, and each one of them, of unlawfully, wilfully, knowingly and feloniously obstructing the recruiting and enlistment of the United States to the injury of the service of the United States. Under these counts the question for you to determine is whether the defendants, or any one of them, wilfully and knowingly obstructed the recruiting and enlistment service of the United States, but the obstruction need not be physical, and all obstruction of such service is injurious to the service of the United States. Obstruction does not necessarily imply prevention. Any and all acts and words or writings that interfere with the operation or success of the

military and naval forces of the United States, and all attempts, successful or unsuccessful, by acts, words, or writings to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States in time of war work to the injury of the service of the United States. If some third person should go about soliciting and urging young men not to enlist, extravagantly and untruly depicting the horrors and dangers or consequences of war, impugning the motives and purposes of the President or Congress in declaring war, and misrepresenting the objects sought to be attained by our Government in declaring the existence of a state of war, we would have a case where a jury well may find a wilful obstruction of the recruiting or enlistment service of the United States to the injury of the service of the United States, even if the Government is unable to prove that a single person was induced by such acts not to enlist when otherwise he would have enlisted."

Bulletin No. 79 contains the instructions of District Judge Howe (U. S. D. C. Vermont) in the

case of the United States vs. Clarence H. Waldron. The Court said:

"This count charges the defendant with wilfully obstructing the recruiting and enlistment service of the United States, to the injury of the service of the United States, and in considering the case under this count the word 'wilful,' as used here, means the same as it was defined to mean under the second count. The word 'obstruct' is defined to mean 'to hinder,' 'to embarrass,' 'to make progress in the recruiting or enlistment service more difficult or slow,' and in its broadest sense it means active opposition to the recruiting or enlistment service of the United States by advising or counseling others not to enlist; 'to the injury of the United States' is defined to mean to hinder or delay enlistments in the military or naval service of the United States. Active opposition to the recruiting or enlistment service of the United States would tend to injure such service.

"To repeat, the statute provides that it shall be unlawful for a person when the United States is at war to wilfully obstruct the recruiting or enlistment service of the

United States to the injury of the service of the United States, and the word 'obstruct' is defined to mean 'to hinder,' 'to embarrass,' 'to make progress more difficult or slow,' and in its broadest sense it means active opposition to the recruiting or enlistment service of the United States by advising or counseling others not to enlist; 'to the injury of the United States' is defined to mean to hinder or delay enlistments in the military or naval service of the United States. Active opposition to the recruiting or enlistment service of the United States would tend to injure such service.

"To say to young men between the ages of 21 and 30, inclusive, after they had registered for military duty on June 5, 1917, in obedience to the proclamation of the President, 'The boys will have to register, but if called upon it does not mean they will have to go'; 'when the draft call comes, do not heed it, the law will pick it up and fool around with you for a year, and by that time the war will be over'; 'personally I would resist the draft to being shot'; 'a Christian ought not and should not fight'; 'a Christian can take no part in the war';

'you will have to register, but you will not have to fight'; 'do not shed your precious blood for your country'; and what is said in the pamphlet, would tend to obstruct the recruiting and enlistment service of the United States and injure the service of the United States."

Bulletin No. 81 contains the charge of District Judge Elliott (U. S. D. C. South Dakota) in the case of the United States vs. John H. Wolf. The Court said:

"Now, in that connection, you are instructed that there are many ways that could occur in which the enlistment and recruiting service would be obstructed. It does not have to be stopped. The statute does not mean that; that the obstruction must extend to the point of actually stopping the whole service. It might be obstructed by taking the registration list and destroying it; by obliterating some of the names on the list; and by persuading some young men who are on that list and subject to call to flee the country or to resist being put in the service. It might extend only to one man, but that would be obstruction. So that obstruction

in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent, in whole or in part. As used in the indictment, it means active antagonism to the enforcement of the act of Congress; that is, to effectively resist or oppose the command of the law, to the injury of the service of the United States, or by acts or words to intentionally cause others to do so; to interfere or intermeddle in such a way and to such an extent as to render more burdensome or difficult the enforcement and execution of the law, to the injury of the service of the United States. You are instructed that even though you find the words alleged in the indictment to have been spoken, you must still, before you can convict, determine the question as to whether or not they were used wilfully. This is the same subject that I have attempted to cover, except it is stated in a different way; that is, that they were intentionally made and that they were made with the purpose and that that purpose was the thing that is prohibited and referred to in the separate counts in the indictment; that is, prohibited by the different provisions of this

section 3, under which the indictment is drawn. You must further find that the natural and ordinary result of the language used by him, in the manner in which you find that he used it, under the circumstances in which you find he used it, would be to obstruct the recruiting and enlistment service of the United States.

"Here, of course, you have to take into consideration what are matters of common knowledge, that men must go from home, and fathers and mothers must make the sacrifice, that men who enlist are often influenced more or less by the wishes of their parents, and they are influenced more or less by their view of conditions that they are entering; take all those things into consideration; then take the language used, if you find it was used, as heretofore instructed, and determine whether or not his purpose and intent were to interfere with men whose minds might be guiding them to enlist, or to interfere with those who might have influence or domination over them, or control over them; in other words, from a practical standpoint, whether or not it would

interfere naturally with the number of enlistments, or the number recruited by the recruiting officers. It is not necessary, of course, and not practical that the Government should show that some particular person was induced not to enlist by reason of the things charged to have been said. It is sufficient if the things said, as you find under the circumstances they were said, as you find them, were said with that purpose and that they had the necessary tendency to do the things that are prohibited by this section and that they were in their nature such as ordinarily would bring about or tend to bring about that result. Then the offense is complete."

Bulletin No. 82 contains the charge of District Judge Munger (U. S. D. C. Nebraska) in the case of the United States vs. Gustav Pundt. Here, the alleged statements were made to a young man not 18 years of age and, therefore, at that time not capable of enlisting. The Court said:

"To obstruct enlistment may be accomplished by the use of mere words. While we can understand that it could be done by acts such as by physical interference with those

who are endeavoring to enlist, it can equally well be done by statements and language the effect of which would be to impede, retard, discourage, and restrain those who otherwise might enlist. To obstruct may be accomplished by raising an obstacle, mental obstacle, in the mind of the person to whom the remarks are addressed, such as to cause him to pause and to hesitate, even though he might finally overcome and not be prevented from enlisting in the service of the United States. But if the remarks are such that they are reasonably and naturally calculated to cause the person to whom they are addressed to be impeded and retarded in his willingness to offer himself as an enlisted soldier and the effect of the remarks is to cause such a person to pause and be delayed in reaching a decision, then you can find that what was said was an obstruction to the enlistment service of the United States."

Bulletin No. 83 contains the charge of District Judge Howe (U. S. D. C. Vermont) in the case of the United States vs. Harold Mackley. The Court said:

"As to the offense charged in the fourth count: This count charges the defendant with wilfully obstructing the recruiting and enlistment service of the United States to the injury of the service of the United States, and in considering the case under this count the word 'wilfully' is defined to mean the same as it was defined to mean under the third count. The word 'obstruct' is the important word under this count, and that is defined to mean 'to hinder,' 'to embarrass,' 'to make progress in the recruiting or enlistment service more difficult or slow.' In its broadest sense it means active opposition to the recruiting or enlistment service of the United States by advising or counseling others not to enlist; by describing the horrors of a soldier's life and the illtreatment of soldiers; by holding out to boys of military age that if he—the defendant—should happen to be called he would shoot his comrades, and by telling them that if all Germans would do the same Germany would win the war; and, in short, anything which would tend to deter others from enlisting, would constitute obstructing the enlistment service of the United States."

Bulletin No. 84 contains the opinion of Circuit Judge Buffington, upon appeal before the United States Circuit Court for the Third Circuit in the case of the United States vs. Krafft indicted for violation of the Espionage Act. A somewhat similar requested instruction was urged upon this appeal as in the one at issue, concerning which the Court said:

> "As further ground to support such request for binding instructions of acquittal the defendant contended 'that the evidence can not be complete until it is shown that these things are to the injury of the service of the United States; * * * * and that there is no evidence showing that such injury has occurred to the service of the United States. Assuming that the words were said, there is no evidence that the words had any more effect than to cause a disturbance in the crowd.
>
> "This request the court denied, saying: 'As I view it, there are really two questions, both of which are jury questions. The first question is whether or not the defendant spoke the words which are alleged in the indictment and which he is charged with

speaking. If he did not, that ends the case. The jury will determine whether he did that or not. Second, if he did, what was the intent in his own mind in speaking them? What effect did he intend that they should have upon those who listened who were already in the service or might possibly be called into the service; and it seems to me that, under the circumstances, that should be determined by the jury. Therefore, your motion will be denied and an exception granted.'

"This holding—viz, that there were two questions of fact involved; first, were the words charged spoken; and, secondly, if spoken, what was Krafft's intention in speaking them: what effect did Krafft intend they should have on those hearing them—were afterwards embodied in the charge which is printed in full on the margin.

"In thus confining the jury to the two issues specified above the court, in effect, denied the contention of defendant's counsel that to constitute the crime the Government was required to go further and show not

only that the words were used with the intent to effect insubordination, disloyalty, mutiny, or refusal of duty, but that they actually did produce that effect and injured the United States' service. Did the court commit an error in so holding? Was it necessary for the Government not only to show the defendant used the words; not only that he used them with intent to cause insubordination, but that it must be shown that his counsel and purpose actually caused mutiny, insubordination, disloyalty, or refusal to obey orders? We can not accept this view. Indeed, the clear statement of the defendant's proposition is its best refutation, for if that position be sound the defendant's guilt would be determined not by what he did in the way of counseling disloyalty, but in what his hearers did in the way of following his directions. In other words, the defendant could do all in his power to bring about disloyalty, but as long as he did not succeed he committed no crime; but if his counsel induced action, and that action resulted in insubordination or mutiny, then what the defendant did by way of counsel was later made a crime by

the person who followed his counsel.

"Manifestly, Congress had no such purpose in view, nor can the simple and plain words of the act be given such meaning. In that regard the statute does not specify the writings, speech, or, indeed, the kind of means to be used; it makes one comprehensive, inclusive crime, 'whoever, when the United States is at war, shall cause'; that means actually cause, succeed in causing; that is one crime the statute specified; and, also, whoever shall wilfully 'attempt to cause' is put on the same status. Both 'wilfully causing' and 'wilfully attempting to cause' are by the statute made alike criminal. And such being the case, the attempt to cause being forbidden, as well as the causing, there is no ground to construe or apply this statute on the theory that insubordination, mutiny, or disloyalty must be effected. To so hold would be to defeat the whole purpose of the statute. For the purpose of the statute as a whole was not to wait and see if the seed of insubordination (in this case sown in August in Newark) at a later date in some camp sprang into life and brought forth fruit, but it was to prevent

the seed from being sown initially. Moreover, it is clear that this new statute was to enable the civil courts to prevent the sowing of the seeds of disloyalty, for with the fruits of disloyalty to which a misguided soldier might be led by the disloyal advice, the military court-martial already provided was sufficient. The statute was not addressed to the misguided man who was in the service, but was manifestly to include anyone (for 'whosoever' is a broad word, inclusive word) who in any way wilfully created or attempted to cause insubordination. Clearly the court below was right in holding that if, in fact, the defendant used the language alleged, and if his purpose was wilful to cause insubordination, then the statute was violated. Clearly it was right in holding that, to constitute the crime at the start, it was not necessary for that wilful purpose to succeed."

Bulletin No. 85 contains the remarks of District Judge Munger (U. S. D. C. Nebraska) in the case of the United States vs. Henry Frericks, upon a motion for a directed verdict:

"Now, to obstruct the recruiting or en-

listment service I take it to be not only to prevent recruiting or enlistment but to hinder or impede or put obstacles in the way of the service, and if the defendant by his language would chill the ardor or arouse the fears, or make reluctant or delay those to whom he was speaking, or whom otherwise might enlist I think it could be said that he was obstructing the recruiting service. We will suppose there was a meeting in a public hall where thousands were gathered together, and they were asking for soldiers to enlist in the war, and in the Army, and some were to arise and say that of those that enlisted half would be killed and wounded and rendered helpless for life. Now, that, without any proof that anyone actually was deterred, I think it may be stated that one who made that speech did obstruct the enlistment. That is, he raised a mental obstacle toward decision and resolution of those who would naturally enlist under the call of patriotism, and that he obstructed by the natural result of what he said the ardor or spirit that causes enlistment, and so I think that the jury may say under that count whether the defendant violated this act.

"The sixth count charges a statement somewhat similar made to Mr. Fisher, and perhaps Mr. Martin also. At any rate he said, 'Let the soldiers go to France,' swearing, 'We will sink them all, and make the ocean red with their blood. Germany cannot be whipped and the United States has no business in this war.' And other statements. I think it is proper for the jury to say whether that was wilful obstruction of the enlistment service. The last count says that he said, in order to obstruct the enlistment service, that 'even if only the women were left in Germany, Germany could defeat and overcome the United States in the war.' And these statements were all made to men within the enlistment age, so that I think there is a case here for the jury under the first, third, sixth, and twelfth counts."

In his instructions to the jury upon this same case, the Court said:

"Now, the other three counts 3, 6 and 12 are drawn under the second portion of the statute which I read to you and which says in substance that whoever shall wilfully obstruct the recruiting or enlistment

service of the United States to the injury of the service or of the United States, is guilty of an offense. Now, what is the enlistment or recruiting service of the United States? In addition to those who are taken under the draft law of the ages of 21 to 31, that is over 21 and under 31 years of age, there may enlist in the naval or military forces of the United States any man who is over the age of 17 and under the age of 41, by the portion of this same selective-service act, commonly known as the draft law. So that any man over the age of 17 and under the age of 41, may enlist and he is a possible power in the naval and military forces of the United States. When the statute says that one wilfully obstructs the recruiting or enlistment service of the United States, it says in effect, that they obstruct the service which seeks the enlistment of men between those ages. Now what is it to obstruct this service? It must be, as stated before, done wilfully; that is, knowingly and with an evil purpose, not merely unthinkingly, or by unguarded, accidental, or unintentional remarks without the purpose that they would have any result, but it may be done by advising, of

course, directly, as has been illustrated. In an argument against enlistment in the Army, it could be done by saying to men who could enlist and might enlist, not to do so, that it is against your interest, and it is not your duty; but it also may be done by statements, that may impede or hinder or delay or put obstacles in the way of enlistment to the embarrassment of the enlistment service. It may be found to be an obstruction to the enlistment service of the United States if statements are made to those who may enlist, the natural and reasonable effect of which would be, if believed, to discourage, delay, or hinder even though it did not finally prevent those persons from enlisting in the Army or Navy, and thereby injure the service. Statements, the natural effect of which would be to cause men to pause, to consider, to delay, and parhaps to abandon a purpose that otherwise might exist, grow and ripen into action by enlisting in the military and naval forces of the United States, may be an obstruction and may be found by you to be an obstruction. It is not necessary that the obstacle be a physical one. It may be by mere words, because when it

comes to a question of enlistment, a discouragement by words may be more potent than locks or bolts. Statements either of fact or of falsehood or mere prophesy, or predictions, may amount to an obstruction if the natural effect of them is to retard, hinder, or delay the enlistment by those to whom the words are spoken. The evidence shows here that the statements which the defendant is charged to have made under these counts, if you believe they were made, were made to men within the enlistment age, some of them, Mr. Martin and Mr. Fisher—one of them being 33 and the other 34. If you find that the defendant made the statements charged in the indictment or substantially those in these counts, 3, 6 and 12, or either of them, and that he did so wilfully to obstruct, as I have defined it to you, the enlistment service of the United States by so doing, to the injury of that service, then you would be bound to find him guilty under such counts."

Bulletin No. 86 contains the charge of District Judge Munger (U. S. D. C. Nebraska), in the case of the United States vs. H. M. Hendrickson. The Court said:

"Now the service, the enlistment service, comprehends, as it is understood, not only the recruiting office and the machinery where one may be accepted, but it includes those appeals to the patriotism and loyalty of the citizen that may induce him to offer his services. You have seen the posters calling for recruits for the Army or Navy; you know that addresses are made asking for volunteers to enlist; that newspapers, pamphlets, publications ask for men to give their services as volunteer soldiers in this war on behalf of the country, and all such means are a part of the enlistment service or recruiting service and if one obstructs that service, then he does so wilfully under circumstances such as I have cited in the statute, when the nation is at war, he may be guilty under this statute although what he says may not take root in the mind of any man so that he actually fails to enlist—the service has been impeded although the man may not have been. The evidence shows that this remark that this defendant is charged with having made was addressed to two men both of whom were within the enlistment age as any man who is over 17

and is under 40 may enlist in the Army of the United States.

"Now as to what was said, as I have indicated, there is a dispute. Some of the things that are charged in the indictment to have been said, and what witnesses testified were said, could not be said to obstruct one from enlisting or to obstruct the enlistment service, even if they had been said, by any reasonable application of them. For instance, when the defendant said that the lust of gold did not bring him to this country, that he was sent as a missionary from Germany, I fail to see how that could deter in any way the enlistment service. But other things that he is charged to have said, such as his sympathies were all with Germany and that he could not help it, because this war was nothing but a commercial war, and that the United States went into it for gain, that he would as leave be in Germany as in the United States, might be found by you to be of such a nature that they could reasonably have an effect upon the mind of one who might enlist so as to chill his enthusiasm, to cause him to pause and consider whether a war of that nature and a country

of that kind was worthy of his volunteer service. And if the natural and reasonable effect of any such statements as those made to one within the enlistment age and to whom they were addressed would be to place an obstacle to the enlistment service of the United States, then you could find that an offense had been committed by the use of such language, as well as if a physical obstacle had been placed in the way of a man who was on the road to the recruiting office. The obstacle need not be physical, because words of argument or statement, or even of prophesy may be as deterrent and more so than a mere physical obstacle and may be harder to overcome."

Bulletin No. 89 contains the charge of District Judge Elliott (U. S. D. C. South Dakota) in the case of Conrad Kornmann. The Court said:

"Now, as to the matter of obstruction, there are many ways that could occur in which the enlistment and recruiting service would be obstructed. It does not have to be stopped. The statute does not mean that; that the obstruction must extend to the point of actually stopping the whole service. It

might be obstructed by taking the registration list and destroying it; by obliterating some of the names on the list; and by persuading some young men who are on that list and subject to call to flee the country or to resist being put in the service. It might extend only to one man, but that would be obstruction. So that 'obstruction' in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent, in whole or in part. As used in the indictment, it means active antagonism to the enforcement of the act of Congress; that is, to effectively resist or oppose the command of the law, to the injury of the service or of the United States, or by acts or words to intentionally cause others to do so; to interfere or intermeddle in such a way and to such an extent as to render more burdensome or difficult the enforcement and execution of the law, to the injury of the service of the United States. But even if you find the defendant wrote the letter and mailed it, you must, before you can convict the defendant, determine the question as to whether this was done wilfully, that is, that he did this intentionally, that he

wrote this letter and mailed it with the purpose and with the intent alleged in the indictment. You must further find that the natural and ordinary result of the language used by him in the manner in which you find that he used it, and in that connection, that he used it to interfere with the enlistment and recruiting service of the United States.

"Here, of course, you have to take into consideration what are matters of common knowledge; that men must go from home and fathers and mothers must make the sacrifice; that men who enlist are often influenced more or less by the wishes of their parents; and that they are influenced more or less by their view of conditions that they are entering; take all these things into consideration; then take the language used in Exhibit 1, if you find it was used, as heretofore instructed, and determine whether or not the purpose and intent of the defendant was to interfere with men whose minds might be guiding them to enlist, or to interfere with those who might have influence or domination over them, or control over them, in other words, from a practical stand-

point, whether or not it would interfere naturally with the number of enlistments or the number recruited by the recruiting officers. It is not necessary, of course, and not practical that the Government should show that some particular person was induced not to enlist by reason of the things charged to have been said. It is sufficient, in the judgment of the court, if the things said, or written, and mailed or uttered, if you find that they were written, mailed, and uttered, were written, mailed, and uttered with that purpose on the part of the defendant, and that they were in their nature, of such character that under ordinary circumstances would ordinarily bring about that result, then the offense, in the judgment of the court, is complete."

Bulletin No. 90 contains the charge of District Judge Neterer (U. S. D. C. Western District of Washington) in the case of the United States vs. Joseph Zittel. The Court said:

"Count II charges the defendant with wilfully obstructing the recruiting and enlistment service of the United States by making statements calculated to prevent one

A. M. Shultz from enlisting in the naval or military forces of the United States. If you find that such conversation as charged in Count II did take place, and the natural, necessary tendencies of such statements as made by the defendant was to obstruct and interfere with the recruiting and enlistment service of the United States, then the defendant would be guilty. In order to secure a conviction under this count it is not necessary that the Government show that some particular individual was actually restrained from entering the service of the United States. It is sufficient, if it is established to your satisfaction, beyond a reasonable doubt, that the natural and probable consequences of such statement upon the mind of an individual who heard the same was to obstruct the recruiting and enlistment service and that the defendant then and there intended that is should be so.' The act prohibited is the act of the defendant if the condition of his mind at the time of the acts shows wrongful intent, and not the effect or the result or the consummation of the act. You are instructed that at the time charged in this indictment this country was

at war with the Imperial German Government, and the act under which this indictment was returned was a law at the time charged, and it is for you to determine whether the language employed, the circumstances under which it was employed, would, as a natural sequence, obstruct the recruiting of the military and naval forces of the United States."

Bulletin No. 106 contains the charge of District Judge Van Valkenburgh (U. S. D. C. Missouri) in the case of the United States vs. Rose Pastor Stokes. The Court said:

"Coming now to the second count: In the second count of the indictment it is charged that the defendant unlawfully, wilfully, knowingly, and feloniously did obstruct the recruiting and enlistment service of the United States to the injury of the said service, and to the injury of the United States, in thus preparing and publishing the said letter. Much that the court has already said with respect to the first count applies here. In order to constitute the offense the United States must have been at war when the letter in question was prepared and pub-

lished, and this is conceded. The defendant must have acted wilfully and knowingly and must have intended the consequences of her act as charged. It will be unnecessary to repeat the circumstances to which reference has been made as bearing upon the question of a wrongful intent and purpose. You will take into consideration all the evidence in the case introduced on behalf of the Government, as well as on behalf of the defendant, in determining what the object and purpose of the defendant was in causing the publication aforesaid. Your attention has been directed to the provisions of law which make all able-bodied male persons between the ages of 18 and 45 years, inclusive, eligible for enlistment. The Army may be increased by recruiting from such. Recruiting stations are established in this city, as in many parts of the country, and by posters placed in windows and upon bill boards, and by various other means, eligible men are solicited to join the Army and Navy. All such instrumentalities, with the officers in charge thereof, constitute, in part at least, the recruiting and enlistment service of the United States, and anything that tends to ob-

struct and interfere therewith is manifestly an injury to said service, and to the United States itself, which requires soldiers promptly for its defense and for the effective prosecution of the war. It is, of course, apparent that such obstruction or interference need not necessarily be physical. But if the publication made, coming to the attention and notice of those who might otherwise join the service, is of such a nature that is reasonably and naturally calculated to cause such persons to hesitate and refuse to enter the service, then that service has been obstructed and impeded to that extent quite as effectively as though the possible recruit had been retarded or prevented from enlisting by the exercise of physical force. The mind is an important factor in the making of a soldier; nor are we confined to the mental attitude of the eligible recruit himself. It is well known that the feelings and views of parents and those nearest and dearest are powerfully influential upon the man himself, and anything which tends to create distrust, indifference, or even hostility among the masses of the people will be reflected in the temper and the spirit of those expected

to rally to the support of their country.

"Your consideration is invited to the effect which the statements contained in this letter would be likely to have not only upon the community at large but upon those men eligible for recruiting and enlistment. If you believe that language is calculated to obstruct, delay, retard, embarrass, and prevent enlistment in the manner indicated, and that it was intended so to do, that the publication was knowingly and wilfully made for that purpose among others, then it is unnecessary for the Government to show that some special person was, in fact, thus lost to the service. Newspapers of wide circulation may be presumed to have that effect upon the minds of some readers, and injury to the service and consequently to the United States itself would naturally and logically ensue."

Bulletin No. 108 contains the charge of District Judge Aldrich (U. S. D. C. New Hampshire) in the case of the United States vs. Gustav Taubert. The Court said:

"Now, when a nation engages in war it is important that it should not be hindered

—that it should not be impeded or embarrassed or retarded or checked or slackened —by internal obstruction; and that means not only in respect to actual war activities in the field, but it must not be hindered in its activities in the direction of preparedness. There are many things to do; there are many things to be done aside from sending soldiers into the field to meet the enemy. There must be preparations. Means must be devised for constituting a volunteer Army or for creating one through compulsory means. The Army must be clothed; the soldiers must be armed, they must be fed, and they must be furnished with hospitals and many other necessities. The Government must construct military buildings and raise money with which to do it; consequently the Government must not be embarrassed in these respects by unreasonable opposition. This Government might well enough have raised the necessary vast sums of money that have been spoken of through the banks and other institutions, but it saw fit to adopt a different way, and we must accept that way as a reasonable one. For the purpose of furnishing the sinews of war,

so to speak, it has adopted means which give the community at large an opportunity to invest in what we call liberty bonds. While policies in respect to a measure of that kind in their incipient stages are proper subjects of political discussion, when the Government has once adopted a certain course as the proper and wise one it is the part of a loyal citizen to accept it as a Government measure which should be sustained in all reasonable ways. Now, then, in order that the Government should not be obstructed and embarrassed in this great conflict, which is bringing sorrow not only to the Nation and the States but to communities and to almost every home—in order that the Government should not be unreasonably obstructed, Congress speedily passed a law, saying, in substance, that it shall be unlawful and deemed to be a wrong thing to make false statements with intent to interfere with the success of the military or naval forces of the United States or to promote the success of its enemies, or to wilfully cause or attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in respect to the military or naval forces of the

United States, or to wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States. The statute is thus very broad and comprehensive."

Bulletin No. 109 contains the charge of District Judge Neterer (U. S. D. C. Western District of Washington) in the case of the United States vs. Emil Herman. The Court said:

"There are many things which would interfere with the operation or success of the military of the United States, or that would promote the success of the enemies of the United States, or that would interfere with the recruiting and enlistment of the military forces of the United States. As I have stated, we are now at war. The President has called to the colors more than 2,000,000 men. Many thousand have been sent to France. These men must be supported. There are many elements that enter into the matter of success. I will not attempt to detail them or to detail the many elements that would enter into such relation; but any element which would make it more difficult for the United States to prosecute this war or would make

it easier for the enemy of the United States in the conduct of this war would be a violation of the espionage act, if done wilfully and intentionally as charged in counts three and four. And any act which would make it more difficult to recruit and enlist men in our military forces, whatever it may be, if the defendant did such act wilfully and feloniously as charged in the sixth count of the indictment, it would be unlawful. These are elements which must be considered by you from the evidence which has been presented in this case, and you must determine with relation to these various elements."

Bulletin No. 112 contains the charge of District Judge Brown (U. S. D. C. Alaska) in the case of the United States vs. Dick Windmueller. The Court said:

"In this case the defendant is charged with violation of Section 3 of said act of June 15, 1917, in that he wilfully and unlawfully did obstruct the enlistment and recruiting service of the United States, to the injury of the United States, and it is a question for you to determine in this case whether the defendant did wilfully and unlawfully obstruct the recruiting and enlistment serv-

ice of the United States, and if he did so, the obstruction of such service would be and is injurious to the service of the United States. The obstruction need not be physical and does not necessarily imply prevention. Any and all acts and words or writings that interfere with the operation or success of the military and naval forces of the United States in time of war work to the injury of the service of the United States.

"If a man go about soliciting and urging men not to enlist, impugning the motives of the President and of Congress in declaring war, and misrepresenting the objects of the United States in the war, and expressing the hope that the United States would be defeated and all its soldiers killed, and a jury believed that such facts were proved to their satisfaction beyond a reasonable doubt, they would be justified in finding such defendant guilty of such wilful obstruction even if it was not proved that a single person was induced by such words or declarations not to enlist when otherwise he would have enlisted.

"Before you can find the defendant guil-

ty it is necessary for you to find that he intended to violate the law. Of the law itself he is presumed to have full notice and knowledge.

"A man's intent is a process of the mind and it can only be determined by what he says and does. But every man is presumed to intend the reasonable and natural consequences of his voluntary acts and statements and can not say a thing or do a thing that will necessarily have certain consequences and then say he did not intend them."

Bulletin No. 120 contains the charge of District Judge Sanford (U. S. D. C. Tennessee) in the case of the United States vs. J. I. Graham. The Court said:

"Now, it is not a question whether or not he succeeded in creating any insubordination or disloyalty or mutiny in the military forces. It is not a question whether his language had any effect or not on persons who heard him. The only question is whether or not he used this language, as he concedes that he did, in the attempt to create such insubordination, disloyalty, or mutiny —whether he attempted to do it; not wheth-

er he succeeded in doing it."

Bulletin No. 122 contains the charge of District Judge Killits (U. S. D. C. Ohio) in the case of the United States vs. Amos Hitchcock. The Court said:

> "Now, this statute is to be so interpreted, and you take the law of this case from this court, that the success of the defendant's efforts, if you find them to have been in violation of the statutes, is of no consequence at all. It does not make a bit of difference whether he affected the loyalty of either one of the Mortons in the slightest degree or not. That is not the question. If he left them even more loyal than they were before he talked with them, yet if you can say beyond a reasonable doubt in this case that his efforts there were to weaken their loyalty, and he consciously put them forth with that intent, he is within the purview of this statute."

In defendant's brief much reliance is placed upon the case of United States vs. Hall (248 Fed. 150), wherein District Judge Bourquin directed a verdict of not guilty because the evidence failed to show an actual obstruction and injury to the recruiting and enlistment service of the United

States. This learned judge is apparently the only one of the District Judges throughout the United States to so interpret the Espionage Act. As can be readily seen from the great number of decisions reported above, the weight of authority is overwhelmingly opposed to the interpretation contended by the defendant.

As evidencing the divergent views entertained by Judge Bourquin, attention is called that he also stands alone in his opinion that the term "Military and Naval forces" within the meaning of the Espionage Act includes only those organized and in service and does not include persons merely registered and subject to future organization and service. This is indeed an extreme departure from the now generally accepted meaning of what is included in the term "Military and Naval Forces" of the United States, and is merely submitted as an indication of the views of that learned jurist so radically at variance with those of every other Federal court in the land.

In support of defendant's theory of the law that an actual obstruction and injury to the recruiting and enlistment service of the United States must be proven, counsel relies upon the fact that under the original Espionage Act, Congress speci-

fically includes the words "to the injury of the service," and that, therefore, such obstruction was contemplated by Congress. Counsel also points out that in enacting the Amendment to the Espionage Act the words, "to the injury of the service" were omitted, thereby indicating that Congress sought to cover cases which could not be prosecuted under the original act because of the inclusion of those words in the statute.

The answer to this argument is that Congress, having the benefit of a judicial interpretation of the original act as gathered from the above bulletins, came to the natural conclusion that the addition of these words in the statute added nothing to its enforcement so far as the purpose of that Act was concerned, and being so much surplusage and unnecessary, omitted same in the amended Act.

For as so often stated by the learned Courts throughout the country in instructing juries in cases coming under the original Act, anything that tends to obstruct the recruiting and enlistment service of the United States necessarily works an **injury to the service.**

(See Bulletin No. 4, U. S. vs. Wallace, Supra.)
(Bulletin No. 15, U. S. vs. Pierce, supra.)
(Bulletin No. 53, U. S. vs. Hitt, supra.)

(Bulletin No. 78, U. S. vs. Foster, supra.)
(Bulletin No. 79, U. S. vs. Waldron, supra.)

**ASSIGNMENT OF ERROR NO. 6.**

This is predicated upon the Court's refusal to give the following charge:

> "I instruct you, gentlemen of the jury, that before you can find the defendant guilty of the charge preferred against him in the fourth count of the indictment, you must find that the statements charged in that count to have been made by him, or some of them, were made substantially in the form alleged, in the presence of both Luther Davis and William Mitchell, and since it conclusively appears by the testimony of both the Government and the defense that no such statements or any statements were made by the defendant since the Espionage Act became a law, in the presence of these two men, you must find a verdict of not guilty upon this count of the indictment. It is incumbent upon you to try this defendant solely upon those charges preferred against him in this indictment, and if at times other than those mentioned in the indictment, he has violated some law of the United States,

he cannot in this trial be tried or convicted of such other offenses." (Page 28.)

The Court properly refused the charge in the particular form in which it was presented in that it was not necessary to prove that the statements were made in the presence of both Luther Davis and William Mitchell. The Court upon that point charged;

> "In this relation, I direct your further attention to certain language of count four, namely, that Rhuberg, at the times stated, did 'speak, debate and agitate to and in the presence of William Mitchell and Luther Davis, and others to the Grand Jury unknown.' It is not a material variance between the indictment and the proofs if the evidence fails to show that the language alleged to have been uttered by the defendant, if in reality uttered, or some substantial part thereof, was uttered in the presence of both of said parties Mitchell and Davis; but it is sufficient if the language, or some substantial part thereof, was used by the defendant with wilful purpose and intent, in the presence of one only of said persons. The essential inquiry is: Did the defendant wilfully use the language imputed to him, or some

substantial part thereof, whether in the presence of both or either of them, or of other persons to the Grand Jury unknown, if any."

(Trans. P. 155.)

It is elementary that a variance of this kind cannot prejudice defendant if the allegations of the indictment and the proof so correspond that defendant is informed of the charge and can protect himself from a second prosecution for the same offense.

(United States vs. Bennett, 227 U. S. 333.)
(United States vs. Bennett, 194 Fed. 630.)
(United States vs. Jones, 179 Fed. 584.)

Furthermore, the statute would have been violated if the remarks had been made to but a single person.

In the case of the United States vs. Frank Stephens (U. S. D. C. Delaware), reported in Bulletin No. 116, containing the charge of District Judge Woolley, the learned Court said:

"The fact that the alleged false statement was addressed to Mabel P. Van Trump when but one other person was present, is without significance. This part of the statute does

not limit the offense to a false statement publicly made or made to a number of persons collectively or to persons in uniform. In other words, the statute is not directed to public speeches; it is sufficient, the other elements of the offense being present, if the statements be made by one person to another. In this instance the prisoner's statement was made to one, who, because a voluntary, was not the less a recognized instrumentality of the Government, engaged in soliciting money for the Government with which to prosecute the war."

## ASSIGNMENT OF ERROR NO. 7

The defendant contends that the Court erred in overruling the objection of defendant to, and receiving in evidence certain testimony of Luther Davis on the subject of the war, prior to our participation therein. This was properly admissible on the theory of proving one of the essential ingredients of the offense, to-wit: The wilful motive and intent of the defendant. As stated by the Court, it tended to show the trend of the defendant's mind and his disposition towards this Government. (Trans. P. 52.) This ruling is supported by the following authorities:

Bulletin No. 37 contains the charge of District Judge Hamilton (U. S. D. C. Porto Rico), in the case of the United States vs. Vincenti Capo.

The Court said:

> "Another defense is this, as I have understood the opening statements — I am not quite sure how it stands at present—that the defendant was carrying out a propaganda for many years to secure the independence of Porto Rico. I admitted that evidence, although it related to a long time ago. If it is proven to your satisfaction, of course, that defendant acted with one intent alone, he can not be found guilty for doing it with some other intent. I charge you that if the evidence proves that this propaganda ceased with the 3d of September, up to that time defendant's acts would have been no offense, so that this defense, to have merit, must show that these articles are the legitimate outcome of the ultimate situation produced by the propaganda ending in September, and gentlemen, that is for you to say. If you believe that the public situation in Porto Rico, as shown to you by the evidence and known as a matter of common knowledge surrounding us, show that when he

published these articles he was doing it for the purpose of carrying out some legitimate results of that propaganda, then he would not have the intent of doing it in order to influence or obstruct the enlistment of the United States forces."

Bulletin No. 69 contains the charge of District Judge Dayton (U. S. D. C. West Virginia) in the case of the United States vs. H. E. Kirchner. The Court said:

"Finally, gentlemen, I say to you, as has been stated to you by counsel for both the plaintiff and the defendant, that the statements and declarations made by the defendant, H. E. Kirchner, outside of the Northern District of West Virginia and prior to the passage of this act—not after its passage, but prior to the passage of this act, were admitted to you simply to show the animus and intent of this defendant. Only declarations made by the defendant after the passage of this act are substantive evidence, so far as you may deem them to be material to the charges made in the indictment, and are evidence of direct guilt."

Bulletin No. 81 contains the charge of District

Judge Elliot (U. S. vs. Wolf, supra). The Court said:

"The court has permitted the introduction of statements alleged to have been made by this defendant at or about the same time as the statements charged in the indictment; that is, statements alleged to have been made by the defendant to other persons in the same little town where the alleged offenses were committed, statements of a similar character. You are instructed that this defendant cannot be convicted for having made such statements to such persons. I do not remember the names of the different witnesses—it would not be necessary for me to do so or to repeat them to you. You will have the indictment with you and you may refer to that to see whether or not the other statements, here referred to, are set out in the indictment. You are instructed that, as bearing upon this subject of intent to which I have referred so fully, I have permitted this evidence as to the other statements of a similar character, made by the defendant at the same time, or about the same time (and the court has attempted to keep it within a reasonable latitude of the

indictment). I advise you that I have permitted this evidence to go to you that you may consider the same as showing the defendant's continued speech at other times and places at or about the time of the occurrence out of which the charges here have arisen, to the end that you may consider that upon question of intent, because if it throws some light upon that question it would be competent. In the court's opinion it would be competent for you to take that testimony into consideration, to the end that it may assist you in arriving at a conclusion as to whether or not the defendant intended to use this language in the way and for the purposes alleged in the indictment. The other conversations at or about the same time may help you to say whether or not, and may throw some light upon the views of this defendant. They may enable you to discover, through the light of those other conversations, the bent of mind of the defendant, the attitude of the defendant toward the maintaining of military forces in the United States."

Bulletin No. 106 contains the charge of District Judge Van Valkenburgh (U. S. vs. Stokes, supra).

The Court said:

> "The fourth or remaining question is what was the intent of the defendant in thus exploiting the views contained therein? You have heard her statements and explanations. You consider them in connection with all the evidence in the case and as part thereof. You are, of course, not concluded thereby but have resort to all the surrounding facts and circumstances in evidence. Other statements by the defendant, both oral and written, within a period proximate to the offense charged, have been placed before you for the purpose, and for the sole purpose, of shedding light, if any they may, upon her intent and purpose, because, as I have said, the wrongful intent must be present. It is a part of the charge that the defendant made an attempt to cause insubordination, disloyalty, mutiny, and refusal of duty. The defendant is not on trial for any words or expressions other than such as are contained in the indictment, but you may have recourse to her other utterances, admitted in evidence, in arriving at your conclusion of her intent and purpose in writing this letter of which complaint is made."

Bulletin No. 109 contains the charge of District Judge Neterer (U. S. vs. Herman, supra). The Court said:

> "Evidence was permitted of the purchase and circulation of other literature by this defendant bearing upon the war and the conduct of the war, and of conversation, statements, and likewise correspondence of defendant which might show his condition of mind. This was permitted only for the purpose of indicating to you the trend of his thought with relation to the particular act charged, so as to enable you to conclude the particular intent that induced his conduct if you find that he did any act which is against the law."

Bulletin No. 122 contains the charge of District Judge Killits (U. S. vs. Hitchcock, supra). The Court said:

> "You have been permitted to hear testimony to the effect that he presided at a certain meeting last year in Cleveland when Ruthenberg and Wagennecht and Baker spoke on the subject of the position of the Socialist Party to the war, and that he introduced the speakers. The Court permitted

you to hear what those speakers said in this man's presence and while he was exercising the function of presiding officer. The only place that line of testimony has in this case is to give you the right to consider whether or not the language that was uttered by these men under the apparent sponsorship of the defendant as the presiding officer of the meeting, having, as the testimony here tends to show, a knowledge of the purpose of that meeting, was of such a character as that a loyal man, observant of his duty toward his country, and hearing it, would have been filled with resentment, and if so, whether or not the conduct of the defendant as presiding officer of that meeting in not reprobating that language is indicative at all of his manner of thinking, or has any tendency to establish, in your judgment, his sympathy with that kind of utterance. And if you do so consider his conduct, then you are justified in referring to that conduct for light upon his manner of thinking and upon the subject of what his intent was when he talked to the Morton boys. And the same line of reasoning and the same range of application applies to the other statements put

in evidence here ascribed to the defendant, at other times, to these reporters, and to Mrs. Hyre, and to his fellow member on the school board, and the records of the school board, the resolutions adopted at the Socialist meeting in Cleveland—all of these are properly in this evidence as legitimate matters of reference on your part, that you may get the proper light, insight, into the condition of this man's mind on the 6th of April last in the Morton house, as reflecting the intent with which he made the utterances which you find against him, if any. And they go no further than that. They do not add anything to his guilt; they are not substantive testimony in this case as to guilt. They are only incidents which may have weight with you in this narrow way. Whether they do help you or not is entirely for this jury to say. The court has no right to suggest anything about it at all."

Furthermore the Court expressly limited and qualified the effect of this testimony as shown by the following instruction:

"Evidence has been admitted tending to show that defendant made certain statements derogatory to a friendly attitude on his part

towards this Government as against Germany, prior to the time when war was declared by this country against Germany, and prior to the time when this country became engaged in assembling military forces under the selective draft act. This evidence was admitted for a special purpose, and your consideration of it will be confined to that purpose only, namely: To show, so far as it has a tendency in that direction, the bent of mind and attitude of this defendant, whether more favorably disposed towards Germany than to this country, and the effect such attitude, whatever it was, may have had upon his subsequent acts and demeanor, as an aid for determining with what intent he used the language imputed to him by the indictment, if it appears that he uttered the same, or some substantial part thereof."

(Trans P. 157).

It might be mentioned, in passing, that the defendant failed to request an instruction limiting the effect of this testimony before the jury, and, therefore, is barred from urging as error the failure of the Court so to do.

U. S. vs. Van Deusen, 151 Fed. 989.

U. S. vs. Itow, 233 Fed. 25.
Tevis vs. Ryan, 233 U. S. 273.

**ASSIGNMENT OF ERROR No. 8.**

The defendant urges here as error the overruling of the motion for arrest of judgment, the points in which motion are that the indictment failed to allege the military or naval service of Mitchell or Davis, and that the defendant had knowledge of the proposed or intended enlistment of these men.

That this is not required by the terms of the statute has already been covered by what has previously been said. Furthermore, as stated in Bulletin No. 76, containing the charge of District Judge Jack, in the case of U. S. vs. Harper, supra:

> "Neither is it necessary that the Government prove that such statements were made in the presence of persons liable to military service. This latter phrase in the indictment may be regarded as surplusage. It is sufficient if you find that such statements were wilfully made with the knowledge that they might be repeated and reach the ears of persons liable to the draft and that they were made for that purpose and with that intent,

thereby to cause insubordination, disloyalty, mutiny, or refusal of duty. However reprehensible the language may have been, it would not constitute the offense charged unless used with such knowledge and intent."

**ASSIGNMENT OF ERROR No. 9.**

This is based upon the Court's refusal to grant a new trial. It is elementary that the granting of a new trial is within the sound discretion of the Court and error cannot be predicated upon the refusal thereof.

(U. S. vs. Bernal, 241 Fed. 339.)
(U. S. vs. Clark, 245 Fed. 113.)

As stated by the appellate court in the case of U. S. vs. Krafft, reported in Bulletin 84, supra:

"We have thus quoted from the charge at length to show that the law was properly construed by the court and the questions of fact were clearly and properly defined and their determination left to the jury. The jury having found the words charged were used and that Krafft used them with the wilful intent charged, we are bound to accept their verdict and these findings as con-

clusive, if there was any evidence from which a jury could reasonably draw the findings it has made." Humes v. United States, 170 U. S., 210.

"This court has only appellate jurisdiction, and no matter what our opinion of the facts may be, we cannot, as the court below could have, grant a new trial; but our province is to examine the evidence and ascertain if there was evidence to submit to the jury; or, to put it in another way, whether it was the court's duty to withdraw the case from the jury and direct the defendant's acquittal. With that in view, the judges of this court have severally examined and collectively discussed all the evidence, and we agree that the court below was bound, under the proofs, to submit the case to the jury."

## CONCLUSION

Out of abundance of caution, we have endeavored conscientiously to answer each and every objection raised by the defendant to the record, but it must already appear quite manifest that there is but one alleged error seriously urged by counsel, and that is that the Third clause of Section Three of the Espionage Act places the burden

upon the Government to prove that the defendant did in fact obstruct the recruiting or enlistment of either Luther Davis or William Mitchell, whereas, the evidence showed that neither of them were in any manner affected by the statements of Rhuberg.

We have endeavored to show by practically the unanimous opinion of the District Court Judges throughout the country that a fair interpretation of the Espionage Act requires no such onus on the part of the Government as is here contended. Their holding is in accord with every principle of logic and reason. To adopt the construction of the Act urged by the defendant would not only place an additional and unnecessary burden upon the prosecution, but would seriously hamper the prosecution of a most dangerous form of German propaganda. It would greatly weaken the efficacy of the act and help none but the enemy. So long as the intention to obstruct, the purpose to obstruct, the motive to obstruct is present, then surely everything that the law condemns is present, although the desired result may not have been accomplished.

While Congress may have inserted the word "attempt" in the original act and thus completely

answered counsel's objection, yet it would only be so much surplusage unnecessary to its enforcement. For instance, had Congress sought to embrace only such cases as actually resulted in an obstruction to the recruiting and enlistment service, it would have in effect questioned the loyalty of our citizens, the integrity of our institutions, and crowned with success the efforts of our enemies to hamper our participation in the war. Such a possibility must be apparent to all. Congress sought to prevent by this Act just what Rhuberg did. It did not seek to question the loyalty of Davis or Mitchell, but to suppress the pernicious propaganda of men like Rhuberg. To have required that Rhuberg should in fact poison the minds of Davis and Mitchell and weaken their loyalty to the extent that they would absolutely refuse to take up arms in defense of their country, would have opened the way to public expression of a disloyal character to old men, women and children who could not enlist, to alien enemies of undisputed Germanic sympathy, to men of registration age, physically disqualified for military service or exempt therefrom and to those who, for other reasons, would not or could not enlist. Such a situation, of course, could not be tolerated.

Let us assume that Rhuberg said these things

to a large number of people and all subject to military service, but all intensely loyal and patriotic with every intention of enlisting. Could counsel conscientiously say that if Rhuberg had the good fortune to escape a well merited chastisement, that he could go his way unpunished simply because his audience was in no way influenced or affected by his pro-German utterances? The conclusion is irresistible that such was not the narrow scope of the enactment. It is not so impotent as counsel contends: it is imbued with all the vigor of an outraged people against the insiduous manifestations of a class of people enjoying the benefits and privileges of a free country, yet lending themselves as instruments to a propaganda to further the cause of our enemies. It would be foolish to close our ears and shut our eyes to the various forms of propaganda seeking to discredit and handicap the Government in the prosecution of this war, with the clear and unmistakable purpose of defeating the objects for which the Government is spending billions of dollars and sacrificing thousands of lives. The present unhappy state of the Russian people and the bayonet thrust which has been made at the heart of Italy are illustrations of the baneful results which may follow an enemy propaganda when permitted to undermine the defensive

strength of a nation at war.

It is important that nothing should interfere with the military and naval forces of the United States when it is at war and in a death struggle. This statute, a supreme measure of legislation, is one of the greatest importance. The very purpose of the Act was to prevent any use of language intended to hamper or defeat the Government in its effort to prosecute the war to a successful termination. We are at war. We are organizing great military forces. The Government intends that these forces and each member thereof should give obedience, loyalty and strict performance of duty to the Government. The Government cannot tolerate for a moment any attempt by any one at any time and at any place to interfere with our armed forces. At the present time the United States is confronted with what we all concede to be the greatest emergency that we have ever been confronted with at any time in our history. There is now required of us the greatest amount of devotion to a common cause; the greatest amount of co-operation and the greatest amount of disposition to further the ultimate success of arms that can be conceived and as a necessary consequence no man should be permitted by deliberate act or even unintentionally to do that which will in any

way detract from the efforts which the United States is putting forth, or postpone for a single moment the early coming of the day when the success of our arms shall be a fact and the righteousness of our cause shall have been demonstrated.

The time for the discussion of the merits of the war is past. There are only two sides to the war. One side is in favor of the United States and the other side is in favor of the enemy of this country. Congress has declared the policy of this Government and no person may say or do anything which may delay or hamper the Government in the execution of the provisions of the law in carrying out that policy. Whether the law is good or not is not at issue. As long as the law is the law, it is the duty of every man to obey it and he may not, under color or pretense of friendly advice, do anything with intent to procure its violation.

We are all determined that the war must be won. No other result can be tolerated. We have a right to take into consideration the general knowledge which we must have that there is only one way to win the war and that is to have armed forces. Immediately after the declaration of the war the Government so prepared itself. It anti-

cipated and intended a conflict of arms on land and probably naval engagements at sea. Congress, therefore, immediately set about providing means to support the organized army as it then existed and to raise and support other additional land and naval forces. It was not only necessary to support, equip and transport those forces, but it was also necessary to protect the organization of the military and naval forces and also to guard against interference with further enlistments. It passed a number of acts in furtherance of those purposes. It passed the draft act for the purpose of calling men between certain ages to the service; and for the purpose of protecting those organizations as well as for preventing interference with the enlistment of those forces. it passed the Espionage Act.

The defendant is charged with having made certain utterances which could not fail but produce a temper and spirit. if permitted to go unpunished. that would interfere and tend naturally and logically to obstruct and interfere with the enlistment service. It was just such a situation that the Espionage Act sought to avert.

After all the question here is that of intent. Did the defendant by the use of this language intend that it should obstruct the recruiting and en-

listment service? The Jury, by its verdict, found that such was his intent. It was entirely a matter for the Jury and the Jury alone to determine, nor does it seem possible that the Jury could have decided otherwise.

Here is a man born in Germany, who came here a stranger and we made him welcome and protected him; penniless, and we gave him a home and a competence and permitted him to enjoy the blessings of a free government. He desired to be one of us and we, in trust and confidence, conferred upon him the greatest honor that could be bestowed upon one who is foreign born, that of American citizenship. We accepted his oath of allegiance as given in good faith, thereby opening to him in generous trust the portals of American opportunity and freedom and admitted him to membership in the family of Americans, giving to him equal rights in the great inheritance which had been created by the blood and the toil of our ancestors, asking nothing from him in return but decent citizenship and adherence to those ideals and principles, which are symbolized by the glorious flag of America. How has Rhuberg requited our trust and hospitality? The record shows that he considered his citizenship merely as a convenient garment to be worn in fair weather, but to be

exchanged for another one in time of storm and stress; that he betrayed the splendid trust we reposed in him; that he not only was unwilling to manifest any devotion or patriotism for the country of his choice and adoption and sworn allegiance, but by his words and actions supported the cause of a country with which we are engaged in a bitter struggle of life and death, a country seeking to destroy the very freedom and liberty which Rhuberg, by his oath of allegiance, promised faithfully to support. Thus did Rhuberg repay his obligation to his adopted country. The duty of loyal allegiance and faithful service to this country, even unto death, rests, of course, upon every American, but how greater does that duty and service devolve upon Americans of foreign origin, for they are not Americans by the accidental right of birth, but by their own free choice for better or for worse.

The disloyalty of Rhuberg is enhanced by his effort to poison the minds of the young—upon whom we hope to build the future of America—against the land of their birth, against a cause as high and as sacred as any for which ever people took up arms. Although his efforts failed of accomplishment, they were none the less malevolent and inimical to our institutions and to our success

in this war. The Espionage Act provides the means for his just and merited punishment. It was passed for just such an exigency as this, to combat the enemy propaganda at home while millions of our boys are facing death on land and on sea, to assure for us the right to freedom and liberty, which we now enjoy, and to safeguard which there is no limit to the sacrifice that can and must be made. As so well stated by District Judge Brown in the case of the United States vs. Windmueller, reported in Bulletin No. 112:

> "The United States is awakening as a giant from sleep and will never cease its sacrifice of lives and treasure until human liberty is firmly established in the civilized countries of the world, or else that civilization goes down in blackness and ruin * * * While its brave soldiers are offering their lives as sacrifice upon the fields of battle against the relentless enemy, the far greater number of people, who remain at home, must see to it that traitors and treasonable utterances are not permitted to weaken and destroy their service and success, nor our unity of purpose."

A considerable portion of defendant's brief is devoted to a carefully worded description of the

life of the defendant, as gathered from his testimony while on the stand, undoubtedly in pursuance to a well thought out effort to minimize the gravity of his spoken words in defiance of law. While Rhuberg's past history may be of interest to a trial jury in determining its verdict, or to a trial court in fixing the punishment, it surely cannot be considered here. Suffice to say, the jury after listening to all of the evidence, including Rhuberg's self-serving declarations, decided against him. It is well settled that the question whether the verdict was contrary to the evidence is one which cannot be considered in this court, if there was any evidence in the record in support of the verdict. (U. S. vs. Crumpton, 138 U. S. 361.) The only question that the jury was sworn to determine was whether the defendant wilfully made these seditious utterances. A remarkable feature of defendant's brief is the utter absence of any frank confession or vigorous denial as to the making of these utterances. We must, therefore, assume that he made them. At any rate, there is evidence of that fact, and the jury having found that they were made with the wilful intent charged, the jury's findings of fact are therefore binding upon this court. (U. S. vs. Dean, 246 Fed. 568.)

After reading defendant's brief, overburdened

as it is with pleas for mercy, sympathy and indulgence, all of which have heretofore already been directed to the trial jury without avail, we cannot help but note a striking similarity with the methods employed by the German soldier to obtain mercy at the hands of his captor in battle. "Kamerad," the German lips say, while the German hands plunges a knife into the heart of the trusting and unsuspecting foe. The highly developed German "Kultur" of preaching unrest and sedition under the guise of friendship, has already been demonstrated in the past.

History already records the fate of Russia, the terrible disaster to the Italian armies last October, and the seething mass of dissatisfaction which is being carefully and constantly fomented in all Allied countries, as striking examples of the danger caused through the failure of suppressing promptly and effectively hostile propaganda.

As so well stated by District Judge Speer in the Jeffersonian case:

> "If by such propaganda American soldiers may be convinced that they are the victims of lawless and unconstitutional oppression, vain indeed will be the efforts to make their deeds rival the glowing traditions of

> their hero strain. On the contrary, the world will behold America's degradation and shame, the disintegration under fire of our line of battle, the inglorious flight of our defenders, like the recent debacle of the Russian army, brought about by methods much the same, the ultimate conquest of our country, the destruction of its institutions and the perishing of popular government on earth."

In the face of the remarks charged to have been made by Rhuberg, which he does not even have the hardihood to deny in his brief, it must be patent that his protestation of loyalty at this time does not ring true or sincere. It is but a snare and a delusion; it is but a sham and a pretense.

The defendant had a fair trial, at which he was ably represented. The jury found him guilty. There is ample evidence in the record in support of the verdict.

We, therefore, respectfully submit that it should not be disturbed.

BERT E. HANEY,
United States Attorney.

BARNETT H. GOLDSTEIN,
Assistant United States Attorney.

No. 3196

# United States Circuit Court of Appeals

## For the Ninth Circuit

JULIUS RHUBERG
*Plaintiff in Error*

vs.

THE UNITED STATES OF AMERICA
*Defendant in Error*

## Petition of Plaintiff in Error for Rehearing

Upon Writ of Error to the United States District Court for the District of Oregon

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# United States Circuit Court of Appeals

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JULIUS RHUBERG
*Plaintiff in Error*

vs.

THE UNITED STATES OF AMERICA
*Defendant in Error*

## Petition of Plaintiff in Error for Rehearing

Upon Writ of Error to the United States District Court for the District of Oregon

To the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit:

Julius Rhuberg, the plaintiff in error, respectfully presents this, his petition for a rehearing in the above entitled cause, with a statement of the grounds thereof.

This petition for rehearing is urged by the plaintiff in error, because he feels that the court has

misread the record in the case, and because of the interpretation placed by the court upon Section 3 of the Act of June 15, 1917, known as the Espionage Act.

The decision in affirming the judgment of the lower court is based upon the belief that the record contained evidence of statements made by Rhuberg to Davis after we entered the war, and after the passage of the Espionage Act, which had the effect upon Davis claimed by this court, and upon the further fact that the Act does not require proof of the actual obstruction by the defendant of the recruiting or enlistment service of the United States.

## MISTAKE OF FACT.

On page 10 of the opinion, this court says: "The loyalty of Davis to the Government and his spirit of patriotism was clearly diverted and obstructed by the defendant's statement that 'we had no business in the war, no call whatever to be in the war,' and his advice to witness 'not to enlist, not to get into the army until after he was drafted'; all this had its effect upon Davis, and it was not until after he had talked with other people that he came back to his true course."

This court must concede that statements made to Davis by Rhuberg *prior* to the enactment of the Espionage Act of June 15, 1917, regardless of the immediate or after effect thereof, will never support a conviction for violation of that Act. In other words, the Espionage Act can have no *retroactive* force. It cannot be given *ex post facto* effect.

This being true, there can be found in the record of this cause *absolutely no evidence* of statements made by Rhuberg to Davis *after* the passage of the Espionage Act, or even after we entered the war, and prior to the Act becoming a law, which are shown to have had the effect on Davis claimed by this court, or any effect whatsoever.

Davis himself says (pages 54-55, T. of R.), that while his conversation had with Rhuberg *prior* to our entering into the war had the effect "to cause,"

etc., the effect upon him of any such conversation *after we entered* the war (April 6, 1917, and months before the enactment of the Espionage Law), was *totally different.* The whole of his direct examination upon this point is embraced in the following questions and answers: (Page 55, T. of R.)

"Q. Now, what effect did the conversations of Rhuberg have with you *subsequent to our entrance into the war?*

A. *It didn't have much of any, that didn't.*

Q. What was the reason of the change?

A. Well, other people talked to me, different people around. I quit visiting Borstels, and other people got talking to me, and I got it out of my head; it put me to thinking."

And on cross-examination: (Page 57, T. of R.)

"Q. Now, these statements that he made to you that you speak of, after we came into the war, they didn't influence you in any way, or deter you from enlistment, did they?

A. No, sir; they didn't keep me from enlisting, but still it made me feel bad.

Q. You hadn't intended or expected to enlist, had you?

A. No, sir.

Q. Nothing he said influenced you in the matter, or changed your intentions in any way as regards going into the service?

A. Well, *if I hadn't been married*, it probably would have.

Q. But you were married?

A. I was, yes.

Q. And had no intention of going until you had to?

A. No, sir.

Q. The *only reason* you didn't go *was because of your wife and your baby?*

A. *Yes, sir.*"

It is clear from the statements of Davis above quoted that the change of his opinions which came about, came *before* our entry into this war. What in effect he says is, that before April 6, 1917, he had quit visiting the von Borstels and talked with people holding views differing from those he claimed were expressed by Rhuberg, to such an extent that any conversation had with Rhuberg "subsequent to our entry into the war" had *no effect* upon him.

What then, if "the loyalty of Davis to the Government and his spirit of patriotism was clearly diverted and obstructed." Upon the record, this occurred not only *prior to the passage of the Espionage Act*, but *prior even to the entry of our country into the war;* at a time when it was not only legal, but when organized effort was being openly made to create sentiment favorable to and against the entry of this country into the European War.

There is no statement made by Rhuberg to any person other than the one witness, Davis, which can be looked to to support his unwarranted conviction. There is manifestly nothing said to Davis *after* our entry into the war, and *after* the Act of June 15, 1917, which in any degree whatever supports or even seems to support the verdict of the jury. It is not sufficient to say that the verdict of the jury was against petitioner. Unless the law heretofore for centuries governing in criminal procedure is to be wholly abandoned in an effort to support unwarranted conviction in espionage cases, there *must* be evidence adduced to support the jury's verdict. The Government has wholly failed to adduce any evidence to justify or support it. The record, wholly lacking as it does any such evidence, would, in any other than an *espionage* case, have resulted in an acquittal by the trial jury. The appeal to this Honorable Court is from a conviction by a jury moved, not by *evidence of guilt,* but by intense feeling against anything savoring of disloyalty to this Government. It was a conviction *despite* evidence of the Governments' own witness of the innocence of the defendant. The appeal to this court of this petitioner from such a conviction should not prove a vain and useless effort to receive that justice to which even an alien enemy is entitled.

## MISTAKE OF LAW.

It was contended in this cause by plaintiff in error that there must have resulted from his statements made after June 15, 1917, some injury to the recruiting or enlistment service of the United States, and that since the Government had not shown that such statements did in fact result in any injury, either to the recruiting or enlistment service of the United States, or to the United States, he should have been granted a directed verdict.

This court in reply to this argument said, "The question whether the statements of the defendant did result in an obstruction to the recruiting or enlistment service to the United States was clearly a question of fact to be determined by the jury from all the surrounding circumstances and reasonable inferences to be drawn from established facts under proper instructions from the court."

Conceding only for the sake of our argument that this is a correct statement of a legal principle, we ask: *"Is there not a further principle of law that, before a jury can find that a fact exists, it must have some evidence on which to base such findings of fact?"*

The trial jury in this case had no such evidence before it for the best of reasons: The record contains no such evidence. We can even make this important statement more emphatic. Not only did

this record contain no evidence of injury to the recruiting or enlistment service of the United States, but it goes further. The record contains *positive and conclusive evidence that such injury was in fact not done.* Luther Davis testified that nothing Rhuberg had said to him influenced or deterred him from enlisting (T. of R., p. 57). Luther Davis was the sole individual to whom the statements for the making of which Rhuberg was convicted were made. The Government evidently recognized Davis was speaking the truth. He was their principal witness, and no attempt whatever was made by them to impeach his testimony. Furthermore, there is no proof that Luther Davis communicated the statements to anyone else (see Bulletin 85, page 3).

In order, therefore, for this court to invoke the principle set forth above, it is necessary to say that there was evidence before the jury that an obstruction had been consummated. The record discloses that the only evidence before the jury was the unimpeached statement of Davis denying the obstruction. To find that obstruction occurred, it would have been necessary for the jury to have either ignored the testimony of Davis, or believed he perjured himself. We respectfully submit that when one's liberty is in the balance a conviction founded on such a conclusion should never be affirmed.

## Rule of Probable or Natural Inference Not Applicable.

But this court will answer by saying that the jury could have determined from all the surrounding circumstances and reasonable inferences to be drawn from the established facts in the case, that obstruction actually resulted (Opinion, p. 8), and in this reply is found the principal error on which we base our petition for re-hearing.

A careful reading of the instructions reported in the various Bulletins cited by this court on page 10 of its Opinion discloses an uniformly similar interpretation of this phase of Section 3 of the Espionage Act. Various District Judges have instructed juries that if they believed that the natural and probable consequences of such statements upon the minds of the individuals hearing them was to obstruct the recruiting and enlistment service of the United States they should convict, even though the Government had neglected to prove that some particular individuals had been deterred from enlisting.

We recognize that there undoubtedly have been cases where such an interpretation might be correct, as in cases of the publication of a statement in a newspaper of general circulation, or an address made at a public gathering, there being among those addressed a large number of young men within the draft age. In either case it might very plausibly

be argued that the Government need only prove that the remarks or statements were made and made wilfully, and then it would rest with the jury to determine whether the natural and probable consequences of such statements would be that recruiting and enlistment among some of the young men who read or heard the statements might be obstructed.

Irrespective of the correctness of such an interpretation of the Act of June 15, 1917, we emphatically maintain that it has no applicability to the Rhuberg case. Rhuberg made no written statement. Rhuberg addressed no gathering. Rhuberg was in his own home, on the Mackin ranch, attending to his own business. Davis called on him there. Davis was alone. The statements were made. Davis said they did not deter him from enlisting. Davis went further. He explained that the *only* reason he had for not having enlisted was that he was married and had a baby. In the face of such evidence, was there any reason or necessity for seeking to determine the natural and probable consequences of Rhuberg's statements? Since when has inference, natural or probable, become better evidence than clear, unequivocal, unimpeached statements of affirmative fact?

Had there been one, two, or three other men of draft age present; had Davis testified merely to the making and the nature of the statements,

and nothing had been said as to the effect, either in the direct or the cross-examination, then we concede that the above rule of interpretation might be relied upon. In the Rhuberg case, however, Davis alone was present. Davis has denied that the remarks deterred him from enlisting. Davis makes a most natural and a most complete explanation as to why he did not enlist. Davis was not impeached. Should a jury be permitted to substitute in the place of such conclusive and uncontradicted affirmative statements and circumstances, inferences either natural or probable?

With Davis alone present and with Davis testifying that nothing Rhuberg said had had any effect, then it is as though Rhuberg had never spoken; it is as though Rhuberg, while standing on a hillside in Eastern Oregon attending his sheep, had directed his remarks to the surrounding space; it is as though Rhuberg had withdrawn to the privacy of his room and there given vent to his own private opinions. In the final analysis this is in effect what Rhuberg actually did.

Since these are the facts in Rhuberg's case, we maintain his conviction should be set aside as quickly as it would have been had it been based on any one of the three instances set forth above.

A careful reading, therefore, of the Bulletins cited in the Opinion wherein they say it is not necessary for the Government to show that some

particular person was induced not to enlist, produces this conclusion: Where the defendant makes the statement to two or more individuals within the draft age and the Government proves the statements by one of these individuals, admission by that individual that he was not deterred from enlisting by reason thereof, would not be a complete defense, for the simple reason, that the same remarks might have prevented the others who were also present from enlisting. The jury would not be required to infer that, because the remarks had no effect upon the man testifying, they likewise had no effect upon all those to whom the remarks had been addressed, or who might have even heard the remarks. If, however, there was, as in our case, but *one individual* present, and that individual testified not only that the statements had had no effect, but gives the most natural and complete reason for not having enlisted, and the Government, by making no attempt whatsoever to impeach or contradict such testimony, apparently accepts it as true, then we submit there is no room for inference, probable or natural, and the rule of interpretation set forth in the opinion of this court is inapplicable; and hence, to that extent, *erroneous*.

## Attempt to Obstruct Not Included in Original Complaint.

We contend that at the most Rhuberg was guilty of an attempt to obstruct enlistment, and

that an attempt to obstruct was not made a crime until the Espionage Act was amended on May 18, 1918. (Public 150, 65th Congress.) The original Act read:

> "Whoever . . . shall wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service or of the United States."

The Amended Act reads:

> "Whoever . . . shall wilfully obstruct *or attempt to obstruct* the recruiting or enlistment service of the United States."

This court, however, answers our argument that this and other amendments "were evidently intended to overcome certain technical objections and *enlarge the scope of the statute.*"

We encounter no difficulty in agreeing with the court that the Amended Act certainly *enlarges* the scope of the Act under which Rhuberg was indicted and convicted, in that it makes it an offense to *attempt to obstruct*, whereas in the former Act it merely said "whoever . . . shall wilfully obstruct."

This court, however, in effect finds that while Davis may not have been deterred from enlisting, Rhuberg has nevertheless violated the Act of May 15, 1917. In other words, Rhuberg is guilty of an attempt to obstruct. Here we encounter dif-

ficulty. If the Act under which Rhuberg was indicted and convicted covers "attempts," then *why was it necessary* to "enlarge" it by amending this clause of Section 3?

**What Does "Injury to the Service" Mean?**

Furthermore, such a construction is not sustained by the statute in question. If the words, "obstruct . . . to the injury of the service" mean what they say, how can it be maintained that the Government should be permitted to rest its case without showing an injury by reason of the particular method of obstruction employed by the defendant. Suppose Doe instituted a civil action against Roe under a statute which provided that "whoever wilfully obstructs a public highway to the injury of pedestrians or others using said highway shall be liable in an action for damages, etc." Would Doe be entitled to a judgment merely by proving, for example, that a log had been placed across the road and then rest his case, relying upon the inference that the natural and probable effect of such an act on the part of Roe was an injury to Doe's property? Doe would have been immediately and very properly non-suited. The words, "to the injury of," when they appear in a statute have a definite well-known meaning. Certainly their presence in a civil statute would make them an essential element in the proof of a case instituted thereon. Why, then, should they have a different

meaning or be entirely ignored when used in the original Espionage Act? If they meant nothing, why did Congress deem it necessary to entirely eliminate them in the Amended Act?

### Government Bulletins.

This court cited some twenty-two Bulletins containing cases which, it is maintained, disclosed that various District Judges are in accord with Judge Wolverton's instructions on the lack of any necessity of proving injury, and that the jury may convict if they concluded injury may have naturally or probably resulted from the statements. We comment briefly on these Bulletins.

Bulletin 4, *United States v. Wallace.*

Wallace was indicted on four counts, one for obstructing enlistments. This case is inapplicable in that Wallace's remarks were made where there was a battery of men, either actually enlisted or ready for enlistment. (Page 6.) Judge Wade in his instructions said: "You are to determine the question whether he was trying to restrain enlistment as charged, or words to that effect; or whether he was trying to restrain them from enlisting in the English Army." (Page 7.) In view of the fact that an attempt to obstruct was not made an offense until the Espionage Act was amended by the Act of June 18, 1918, we are surprised that the Bulletin does not disclose a request for an

exception to this phase of the instructions. We also call the court's attention to the second paragraph on page 7 of this Bulletin.

Bulletin 15, *United States v. Pierce.*

Indictment for extensively circulating a pamphlet. This fact alone makes the case inapplicable to the instant case. On page 9, Judge Ray says: "Must the indictment allege and must the Government prove not only that the United States is at war, and that the false reports were made and conveyed with the intent to interfere with the operation or success of the military or naval forces, but that such acts actually resulted either in injury to the service of the United States or were intended so to do? *This is true as to obstructing the recruiting and enlistment service, as the Section so says in plain terms.*" The phrase "plain terms" aptly characterizes the wording of the third clause in Section 3 of the Espionage Act. Because of this characteristic of this clause, we have continuously maintained that it is not subject to the interpretation attempted to be placed upon it by Judge Wolverton or this court.

Bulletin 49, *United States v. O'Hare.*

Indicted for making a speech in presence of 125 people and the same objection as that raised against Bulletin 15 applies here.

Bulletin 53, *United States v. Hipp.*

Indicted on various counts for speaking to

numerous young men. Special attention of this court is invited to pages 5 to 8 wherein among other things Judge Lewis states that under the former Espionage Act Congress "Did not see fit to make it a criminal offense . . . to *attempt to obstruct* the recruiting or enlisment service of the United States."

In defining the word "obstruction" he says: "As used . . . it means . . . to *effectively* resist or oppose . . . to the injury," etc. Effective means successful, complete, *actual.*

Bulletin 55, *United States v. Doe.*

Indicted for writing and mailing circular letters. Referring to the very clause in Section 3 under which Rhuberg is indicted, that court held it was much more fixed and rigid in its fundamental elements than the first two, (page 5), and he likewise used the word "*effective*" in speaking of the character of obstruction.

Bulletin 56, *United States v. Tanner.*

Tanner was indicted on four counts for making statements to various young men on various occasions and hence is inapplicable. Judge Lewis instructed the jury in that case that "obstruct" meant to *effectually* oppose the war, to the injury of the service of the United States. (Page 5.) Particular attention is also called to the last paragraph on page 4, wherein he told the jury that before they would be justified in convicting for obstructing

enlistment "it is necessary that the evidence show beyond a reasonable doubt, that the defendant said the things complained of, or their substance; that he did so wilfully; that the things said as charged *did obstruct* . . . that what was said . . . *caused substantial injury* . . ." and "unless you so find, you will acquit the defendant." We maintain this is a correct statement of the law and yet this court cites the case as an authority in denying our contention which in effect is identical with this instruction.

Bulletin 76, *United States v. Harper.*

Indicted for making statements to *more than one person.* The instruction on page 5 is perhaps correct as there was apparently no evidence of any kind showing that the men were or were not deterred from enlisting.

Bulletin 78, *United States v. Foster.*

Charged with violation of all three clauses of Section 3. In speaking of the count charging the defendant with causing or attempting to cause insubordination, the court said: (Page 3.) "It is not necessary if they did so *attempt*, that they *actually succeeded* in any way." Then later when referring to the 3rd and 6th counts, charging the obstruction of the enlistment service, he said:

> "It would be necessary before you can find the defendants, or any one of them guilty under those counts, that you find that their efforts

have not only *obstructed,* but had been to the *injury* of that service. There must have been the *effect* there that is described in the statute *accomplished to some extent at least,* before you can return a verdict of guilty."

Bulletin 79, *United States v. Waldron.*

Convicted for statements and circulating a pamphlet.

That portion of the instruction beginning at page 7, particularly the repeated use of the past tense of the word "obstruct" certainly does not sustain the interpretation laid down by this court.

Bulletin 81, *United States v. Wolf.*

Indicted for making statements to various young men. Particular attention is called to page 5, wherein Judge Elliott said:

"Congress has made it a criminal offense not only to cause insubordination, disloyalty, mutiny, or refusal of duty, as I have attempted to explain to you, but it said, further, 'to cause or attempt to cause'; that is, the military or naval forces of the United States that are organized. If one causes it or attempts to cause it as to those forces, he is guilty of a criminal offense. When it comes to recruiting or enlistment service of the United States, Congress did not see fit to declare that it is a criminal offense *to attempt to obstruct* that service and that recruiting and enlistment, but

it says 'whoever . . . shall wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service of the United States' shall be guilty of a criminal offense."

If, as contended, Rhuberg at the most is guilty of an attempt, how can this court cite such an instruction in support of his conviction?

The same objection goes to Bulletin 89, *United States v. Kornmann*, page 6.

Bulletin 83, *United States v. Mackley.*
Bulletin 86, *United States v. Hendricksen.*
Bulletin 108, *United States v. Taubert.*
Bulletin 120, *United States v. Graham.*

In all four of these cases the defendants were indicted and convicted for making statements to various young men, and for the reasons herein before set forth are inapplicable to the case at bar.

Bulletin 85, *United States v. Frerich.*

Statements made to a number of young men and Judge Munger among other things instructed the jury:

"It is necessary under the other counts (relating to obstructing enlistment) that the statements were made wilfully and that they were made to obstruct and *did obstruct* the recruiting or enlistment service of the United States *to*

*the injury* of the service or *to the injury* of the United States."

There is nothing in this instruction authorizing the jury to infer that the statements naturally or probably would have obstructed, but the sole question was, *did they obstruct?* Yet this court cites this case in confirming Rhuberg's conviction.

Bulletin 106, *United States v. Stokes.*

As the court well knows this was an indictment for publishing a letter in the Kansas City Star, a daily newspaper of wide and general circulation, and for reasons hereinbefore given is wholly inapplicable to the present case.

Bulletin 109, *United States v. Herman.*

Convicted for publishing a circular letter and hence likewise not applicable.

Bulletin 122, *United States v. Hitchcock.*

Despite the fact that attempted obstruction was not made an offense until the amendment to the Espionage Act, nevertheless the contrary expression is given on page 13 of this Bulletin.

**Federal Court Decisions.**

On page 11 of its opinion this court refers to five Federal Court decisions, claimed to show that objections of the same character here presented were passed upon adversely to our contention. They are the following:

The case of *Masses Pub. Co. v. Patten*, 247 Fed. 24, 38, was a suit by the publishing company to restrain the postmaster of New York City from preventing the mailing of a magazine which had a circulation of 20,000 to 25,000. The postmaster had made the order on the ground that the publication violated Section 3 of the Espionage Act of 1917. No question of whether the publishers were guilty of a criminal violation of the Act was involved in this case, and the sole question was whether the magazine could be mailed because it did not in so many words directly advise or counsel a violation of the Act. (Page 37.) The difference between that case and the one now before this court is so manifest as to make further comment unnecessary.

The case of the *United States v. Krafft*, 249 Fed. 919, was an indictment for making statements to a number of men already mustered into the United States Military Service with intent to effect mutiny, etc. The entire case is confined to a totally different phase of the Espionage Act than that under which Rhuberg was convicted.

This case is of interest, however, for the following reasons: Krafft claimed that the Government should not only show he made the statements with intent to cause insubordination, mutiny, etc., but that his words actually produced this result. Circuit Judge Buffington replying to this argument said:

> "Manifestly, Congress had no such purpose in view, nor can the simple and plain words of the Act be given such meaning. In that regard the statute does not specify the writings, speech, or indeed the kind of means to be used; it makes one comprehensive, inclusive crime—whoever when the United States is at war shall cause'. That means actually cause, succeed in causing; that is one crime the statute specifies, and also whoever shall wilfully 'attempt to cause' is put on the same status."

In other words if this clause of the Espionage Act had merely provided, "whoever . . . shall wilfully cause . . . insubordination," etc., it would be necessary to show actual insubordination, for the court says: "That means actually cause, succeed in causing." The including of the words "or attempt to cause" in this same clause of Section 3, according to Judge Buffington, places the court in a position where "there is no ground to construe or apply this statute on the theory that insubordination, mutiny or disloyalty must be effective."

The court realizes that the clause 3 under which Rhuberg was convicted provided that "whoever shall obstruct the enlistment," etc. Not until the following year was the *attempt to obstruct* added to this clause and thereby to use Judge Buffington words, "put in the same status."

No stronger argument for Rhuberg could be desired than this decision of Judge Buffington, which this court cites against Rhuberg.

The case of *Kirchner v. United States*, Bulletin 174, was an indictment for making false statements at Elizabeth, West Virginia, to various persons, and the facts, bringing it under a different clause of Section 3 of the Espionage Act, likewise make this case inapplicable.

In the case of *O'Hare v. United States*, 253 Fed. 538, Miss O'Hare was indicted for delivering an address at a public meeting at Bowman, North Dakota, before an audience of 100 or more people. This is the only one of the five cases cited by this court on page 11 of its opinion which considers an indictment for the making of oral statements, and hence within the same clause of Section 3 on which Rhuberg was convicted. Circuit Judge Hook in refusing to reverse for failure of the trial court to instruct that the Government should show that some particular person was persuaded not to enlist, based his refusal on the ground that under the circumstances and the language used in that case, injury was presumed to have resulted. This is in line with our argument that where an address is made to many people, the person selected by the Government to prove the making of the statements need not show that he was not deterred from enlisting. The jury could infer that any one of the remaining

persons addressed might have been deterred. Moreover, there was substantial proof that the defendant embraced the occasion. Even the Government makes no claim that similar circumstances exist in our case. Rhuberg was at his own ranch, attending to his own business, and Davis sought him out. There were no other people present.

The case of *Doe v. United States,* 253 Fed. 903, is likewise not in point. Doe was convicted for mailing hundreds of circulars which contained statements violative of Section 3. The same objections exist against the citation of this case as an authority in the Rhuberg case as are set forth in our comments on the O'Hare decision.

Bulletin 82, *United States v. Pundt.*

In this case Judge Munger, in speaking of the effect of the statements said: "It should be such as would cause a person to pause and be delayed in reaching a decision to enlist." (Page 4.) This is exactly what we maintain the Rhuberg case fails to disclose. Davis neither paused nor hesitated, nor was he daleyed in enlisting by reason of any statements which Rhuberg made.

Bulletin 90, *United States v. Joseph Zittel.*

Judge Netterer in his instructions to the jury in this case stated: "That defendant should be convicted if it was proved that the act was that of the defendant and he committed the act knowingly,

made the statements with wrongful intent, and that the effect or the result or the consummation of the act had nothing to do with the case." This instruction is so clearly out of harmony with those contained in the remaining Bulletins cited by this court as to require no further comment.

Bulletin 112, *United States v. Windmueller.*

We have read the instructions in this case several times and still do not understand how Windmueller could have been indicted under the Act of June 15, 1917, for statements made on April 7, 1917. A reading of the first page of this Bulletin discloses that the facts and circumstances are totally different from our case. The man to whom the statements were made was actually on his way to enlist in the Signal Corps.

After a careful reading of the Court's Opinion we are forced to the conclusion that this court has confirmed Rhuberg's conviction because, as they say on page 10, "The loyalty of Davis to the Government and his spirit of patriotism were clearly diverted and obstructed by the defendant's statements." The court, from a moment's consideration, will recall that diverting or obstructing loyalty or patriotism is clearly not an offense under Section 3 of the Act under which Rhuberg was indicted and convicted.

We fully appreciate that ordinarily the filing of

a petition for rehearing is but a perfunctory procedure and an imposition on the court. In this case, however, we feel our client is entitled to have the facts set forth in this petition presented to this court.

We believe that if the court will again read the decisions and bulletins cited in their opinion, with the distinctions and comments made thereon in this petition in mind, they will readily perceive how totally inapplicable they are to the facts in the Rhuberg case. Rhuberg wrote no letters. He addressed no public gatherings. He is simply what the record shows him, an old man whose entire life has been spent with his herds and his flocks, in mountain ranges, in sage brush, in wheat fields. Now that the terrible conflict is gradually receding, and people are regaining their normal perspective, they are beginning to realize that the Espionage Act, while it was unquestionably a most salutory law, was never intended to cover a case of the character of this whole matter. Were he to come to trial today and the facts in his case presented to the jury, we know he would walk forth from the court-room and go to his sheep and his hills. His was not the misfortune of having obstructed or injured the enlistment or recruiting service of the United States. His was the misfortune of being tried at a time when public opinion was aroused to the point of demanding conviction of everything German; when

the very name of Germany was synonymous with crime.

It is within the power of this court to right the wrong which the record shows has been done.

Respectfully submitted,

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G. G. SCHMITT,
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UNITED STATES OF AMERICA,
District of Oregon,
County of Multnomah, ss.

I, Albert B. Ridgway, do hereby certify that I am one of the attorneys for Plaintiff in Error; that I prepared the foregoing Petition for a rehearing on behalf of said Plaintiff in Error; that the same is not interposed for delay, and that in my judgment said petition is well founded.

ALBERT B. RIDGWAY,
of Attorneys for Plaintiff in Error.